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No.

In the Supreme Court of the United States

JOSE ANTONIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), the Court articulated a five-factor test for assessing the reliability of eye-witness identifications. Since that time, however, scientific research has demonstrated that one of those factors—the level of certainty a witness demonstrates in his identification of a suspect—has very little correlation with the accuracy of that identification. The question presented is whether the level of an eyewitness's certainty should be removed from the list of factors to be considered in determining whether an identification made during an unnecessarily suggestive procedure is nonetheless sufficiently reliable to satisfy the requirements of due process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jose Antonio Perez, respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit issued two opinions in Mr. Perez's appeal of his criminal conviction, which are reported at *United States* v. *Perez*, 414 F.3d 302 (2d Cir. 2005) (addressing the interstate facility jurisdictional requirement in the federal murder-for-hire statute) (App., *infra*, 1a-6a) and *United States* v. *Perez*, 138 Fed. Appx. 379 (2d Cir. 2005) (App., *infra*, 7a-10a). The District Court's opinion ruling on Mr. Perez's motion to suppress eyewitness identification evidence is reported at *United States* v. *Perez*, 248 F. Supp. 2d 111 (D. Conn. 2003) (App., *infra*, 11a-21a).

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2005. On October 5, 2005, Justice Ginsburg, as Circuit Justice for the Second Circuit, granted an extension of time within which to file a petition for writ of certiorari until November 10, 2005 (No. 05A300). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property without due process of law * * *.

STATEMENT

Petitioner Jose Antonio Perez, who has steadfastly maintained his innocence, was convicted of participating in a

murder-for-hire, and sentenced to life in prison. Eyewitness identification testimony was central to the government's case. Mario Lopez, a participant in the crime who cooperated with the government in exchange for an agreement not to seek the death penalty against him, told the government that the person who paid for the killing was an auto-shop owner with dark skin. Nearly six years after the crime was committed, Lopez was shown a photo array. The array consisted of photographs of eight individuals. Only one of the subjects—petitioner—had dark skin, and Lopez identified him as the auto-shop owner who had paid for the murder.

Although the government conceded that in fact petitioner was not the auto shop's owner—his brother, who was tried separately for the crime, was—the government sought to support its claim that petitioner had some involvement in the crime by introducing Lopez's out-of-court identification of petitioner. (Lopez did not make an in-court identification.)

After a *Wade* hearing,[1] the district court found that "the use of Jose Antonio Perez's dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure that was unduly suggestive." App., *infra*, 14a. The district court nonetheless found the suggestive out-of-court identification reliable under this Court's decision in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), which established a five-factor test for assessing the reliability of identifications. Applying the *Biggers* analysis, the court found that Lopez's certainty in his identification and his opportunity to view the suspect weighed in favor of the reliability of the identification and counterbalanced the suggestiveness of the array and the lengthy time between the crime and the identification. App, *infra*, 15a-20a. (The court

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[1] See *United States* v. *Wade*, 388 U.S. 218 (1967) (mandating hearings to determine whether a witness's identification of a defendant has been tainted by unnecessarily suggestive procedures and is inadmissible).

also placed a small amount of weight on Lopez's degree of attention but found his testimony had been undermined during cross-examination. App., *infra*, 17a-18a.)

On appeal, citing empirical evidence about misidentifications, petitioner challenged the continuing validity of the certainty factor. At oral argument, however, the Second Circuit panel explained that, regardless of troubling developments in the empirical research, it had no authority to overrule *Biggers* and its progeny. The court's decision rejected petitioner's claims regarding the reliability of the identification, stating that, "[b]ased on the district court's analysis in accordance with the five-part reliability test, see *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), we conclude that there was no clear error." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

In *Neil* v. *Biggers*, 409 U.S. 188 (1972), this Court announced a five-factor test for determining the reliability of eyewitness identifications. The *Biggers* test was reaffirmed in *Manson* v. *Braithwaite*, 432 U.S. 98 (1977), and remains the law of the land today. But empirical research conducted in the decades since *Biggers* and *Manson* establishes beyond reasonable dispute that the test does not do what it is supposed to do. In particular, at least one of the *Biggers* factors—the certainty with which a witness makes an identification—has been conclusively shown to have little or no correlation with the accuracy of that identification.

These advances in knowledge render the continued application of *Biggers* untenable. And indeed, state courts of last resort are increasingly abandoning the *Biggers* test in favor of more supportable measures of reliability, or going even further and holding that identifications based on suggestive procedures are *per se* inadmissible. See Part II, *infra*. But the federal courts are bound by *Biggers*, and must continue to apply its fundamentally flawed five-factor test until this Court tells them otherwise.

This issue is of great significance—the lower federal courts are asked to assess the reliability and admissibility of eyewitness testimony virtually every day. And only this Court can fix the problem, as *Biggers* and *Manson* are constitutional decisions and thus cannot be abrogated by Congress. Nor is there any reason to delay consideration of the question presented: because lower courts are bound to follow *Biggers*, no circuit split will ever arise. In light of thirty years of empirical research demonstrating that the "certainty" factor is far more likely to be misleading than to be helpful in determining the reliability of eyewitness evidence, the time has come for this Court to reconsider *Biggers*.

I. Review Should Be Granted Because Scientific Evidence Has Undermined The Empirical Basis For This Court's Holding In *Biggers* That Courts Should Consider An Eyewitness's "Level Of Certainty Demonstrated At The Confrontation" When Deciding Whether To Admit Evidence Derived From Unnecessarily Suggestive Identification Procedures.

A. The certainty factor established in *Biggers* is an improper means to ensure that evidence from a suggestive eyewitness identification is sufficiently reliable to satisfy the requirements of due process.

"[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114; see also *Foster* v. *California*, 394 U.S. 440, 443 (1969); *Stoval* v. *Denno*, 388 U.S. 293, 301-02 (1967); *Wade*, 388 U.S. at 228. This Court's cases make clear that the "the primary evil to be avoided" by judicial scrutiny of eyewitness identifications is the "very substantial likelihood of misidentification." *Biggers*, 409 U.S. at 198.[2] If a defendant can

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[2] The standard adopted in *Biggers* for out-of-court identifications is an adaptation of the standard the Court used in *Simmons* v. *United States*, 390 U.S. 377, 384 (1968), for in-court identifica-

show that "the confrontation conducted * * * was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law," the identification evidence is not admissible. *Stoval*, 388 U.S. at 301-302.

The overwhelming scientific consensus now shows that the inclusion of a witness's certainty in the list of factors to be considered cannot be squared with the Court's emphasis on avoiding misidentifications. This is so because the degree of certainty exhibited by a witness has very little correlation with the witness's accuracy, and because a witness's certainty can easily be manipulated and affected by irrelevant factors.[3] For example, one review of the relevant literature

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tions. See *Biggers*, 409 U.S. at 198 ("It is, first of all, apparent that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.")

[3] The degree of witness certainty is not the only *Biggers* factor called into question by current scientific consensus. Research has also found that the third *Biggers* factor, the "accuracy of [the witness's] prior description" of the suspect, has an insignificant correlation to the accuracy of the identification. Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 845 & n.214 (1994) (citing Melissa Pigott & John C. Brigham, *The Relationship Between the Accuracy of Prior Description and Facial Recognition*, 70 J. APPLIED PSYCHOL. 547 (1985); Alvin G. Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?* 13 BULL. PSYCHONOMIC SOC'Y 15 (1979); Brian L. Cutler et al., *The Reliability of Eyewitness Identification*, 11 L. & HUM. BEHAV. 233, 253-54 (1987) (showing a negative correlation between memory for peripheral details surrounding the event and the accuracy of the identification); Gary L. Wells & Michael R.

found it "safe to conclude from existing research that under the conditions that typically prevail in short criminal encounters between victims-witnesses and perpetrators, witness * * * confidence in having made a correct identification is, at best, only modestly associated with identification accuracy." Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCH., PUB. POL., & LAW 817, 825 (1995).

Various studies over many years have confirmed the weak correlation between confidence and accuracy. See, *e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277, 285-290 (2003) (reviewing major developments in the experimental literature relating to the accuracy of eyewitness identifications) [hereinafter "*Eyewitness Testimony*"], *available at* http://www.psychology.iastate.edu/faculty/gwells/annual_review_2003.pdf. In fact, the consensus that witness confidence is a very poor predictor of accuracy is strong: one recent survey found that 73% of eyewitness experts would be willing to testify that "confidence is not a good predictor of identification accuracy." Neil Brewer, Amber Keast, & Amanda Rishworth, *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. EXPERIMENTAL PSYCHOL. 44 (2002).

Although some studies have found a statistically significant correlation between witness certainty and accuracy, these studies have found such a relationship only by controlling factors that it is impossible or wholly infeasible to control in the real world. See, *e.g.*, Siegfried Ludwig Sporer,

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Lieppe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can be Misleading*, 66 J. APPLIED PSYCHOL. 682, 685 (1981) (showing that jurors give more credibility to an identification where the witness provides a more detailed description)).

Don Read, Steven Penrod & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULLETIN 315 (1995). Thus, although Sporer's meta-analysis produced a certainty-accuracy correlation, it did so only by considering those subjects who make a "choice" by making an identification, and excluding those subjects who made no choice by making correct and false rejections. *Id.* at 316-317. But in the real world, law enforcement cannot control for these factors to determine whether a particular witness is more or less reliable. See Kenneth Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything about their Relationship*, 4 L. & HUM. BEHAV. 243, 258 (1980) (reporting that a meta-analysis of twenty-five studies on the relationship between certainty and accuracy shows some degree of correlation under optimal witnessing conditions, but concluding that witness certainty should not be relied upon because such factors cannot be easily ascertained in the real world).

Moreover, research has shown that the certainty of a witness is easily manipulated by a variety of factors that have nothing to do with accuracy. See, *e.g.*, Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998) [hereinafter "*Good, You Identified the Suspect*"].

For example, in one study, researchers gave some subjects confirming feedback after they made misidentifcations but gave other subjects no feedback. See *Good, You Identified the Suspect*, at 363. Those subjects who received confirming feedback reported greater certainty in their identification—even though it was wrong—than those sub-

jects who received no feedback. *Ibid.*; see also *Eyewitness Testimony*, at 283 ("In actual cases, it is common for lineup administrators * * * to give confirming feedback to eyewitnesses, thereby inflating the certainty of the eyewitness and confounding the certainty-accuracy relation.").

Similarly, some researchers have noted that "confidence statements from eyewitnesses can be affected dramatically by events occurring after the identification (post-identification events) that have nothing to do with the witness's memory." Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 635, (1998) [hereinafter "*Recommendations for Lineups and Photospreads*"], *available at* www.psychology.iastate.edu/faculty/gwells/whitepaperpdf.pdf. Thus, these scientists have recommended that if certainty is to be included as a factor at all, it should be the witness's certainty immediately after the actual identification (and without any influence by the lineup or array administrator). See *ibid.*; see also Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 HUM. LAW & BEHAV. 581, 592 (2000).

At the same time, research shows that fact-finders place a disproportionate weight on the confidence of the witness in their reliability analysis. One study reported that "[t]here is converging evidence from various streams of research that demonstrates that both professionals and lay people (jurors) put particular faith in the confidence a witness displays when making a lineup decision." Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22, 23 (1993). See also Penrod & Cutler, *Witness Confidence*, *supra*, at 819 (reporting a mock-jury study finding that "nearly four out of five mistaken identifications are believed"); Gary L. Wells, *How Adequate Is Human Intuition for Judging Eyewitness Testimony*, *in* EYEWITNESS TESTI-

MONY: PSYCHOLOGICAL PERSPECTIVES, 256, 271 (Gary L. Wells, Elizabeth F. Loftus, eds., 1984) ("[T]here is at least one important aspect of eyewitness testimony that is misunderstood by the trier of fact, namely eyewitness confidence"). Another study explained that "[j]urors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses—because they rely so heavily on witness confidence, which is relatively nondiagnostic—and are generally insensitive to other factors that influence identification accuracy."; *Recommendations for Lineups and Photospreads*, at 624.[4]

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[4] Scientific research has also shown that other factors not considered by the Court in *Biggers* or *Manson* are more strongly correlated with accuracy. See, *e.g.*, *Eyewitness Testimony*, at 286 (reporting that research has shown that "the ratio of accurate to inaccurate identifications is strongly affected by whether or not eyewitnesses have been instructed (warned) prior to the lineup that the culprit might or might not be in the lineup." (citing R.S. Malpass & P.G. Devine, *Eyewitness identification: lineup instructions and the absence of the offender*, 66 J. APPLIED PSYCHOL. 482, 482-489 (1981)). See also *State* v. *Ledbetter*, 881 A.2d 290, 317 (Conn. 2005) (holding that based on this body of research courts are required to instruct juries on the risk of misidentification that arises when police fail to warn eyewitnesses that a suspect may not be present at an identification procedure or indicate to a witness that a suspect is present).

A strong correlation has also been found between how quickly the witness makes an identification and the accuracy of the identification. See David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10 to 12 Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, 87 J. APPLIED PSYCHOL. 951, 958-960 (2002) (finding that witnesses who make their identification in less than 10-12 seconds were 90% accurate in their identifications in contrast to those who took longer were 50% correct); Sporer, *Eyewitness Identification Accuracy*, *supra*.

At this point there can be no serious dispute that *Biggers*' witness certainty factor is not relevant to the determination whether identification evidence produced from an unnecessarily suggestive procedure is reliable. A defendant's right to due process is jeopardized by a court's reliance on a legal test that fails to achieve its purpose, furthers the admission of unreliable evidence, and places the defendant at risk of being convicted by a misidentification. Only this Court can fix this problem that is daily presented in courts across the country.

B. The use of the witness certainty factor raises serious due process concerns because the *Biggers* factors become relevant only after a court has found that an identification was produced from unnecessarily suggestive procedures and its reliability is highly in doubt.

The *Biggers* factors, it must be recalled, assess the reliability of an identification that a court has already found was the product of unnecessarily suggestive identification procedures. In other words, the accuracy of the identification is already seriously in doubt before the *Biggers* factors are even applied. Even partial reliance on the certainty factor to determine the reliability of the identification therefore is highly problematic.

As this Court has explained, suggestive identification techniques such as those that were used in this case can be highly influential on a witness. See, *e.g.*, *Manson*, 432 U.S. at 111-112. Particularly relevant here is the concern the Court expressed in *Simmons* regarding the suggestiveness of photo arrays that are conducted in a fashion that results in a highly questionable identification:

> Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustwor-

> thiness of subsequent lineup or courtroom identification.

Simmons, 390 U.S. at 383-384.

The research literature corroborates the Court's concern about the dangers of misidentifications that result from suggestive procedures. Studies have repeatedly shown that the use of suggestive identification procedures is highly correlated with inaccurate identifications. See, *e.g.*, *Eyewitness Testimony*, at 285-290 (reviewing eyewitness identification literature discussing system variables that increase or decrease the likelihood of a false identification); see also *Recommendations for Lineups and Photospreads*, at 605 (evaluating 40 cases of defendants who were exonerated through DNA evidence finding that 90% of the cases relied on evidence of eyewitnesses that falsely identified the exonerated defendant).

A suggestive photo array, such as the one used in this case, presents an extra challenge because the defendant does not have the right to counsel at this stage in the prosecution. See *United States* v. *Ash*, 413 U.S. 300, 321 (1973) (holding that the Sixth Amendment does not "grant the right to counsel at photographic displays"). The district court found that "the use of Jose Antonio Perez's dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure that was unduly suggestive." App., *infra*, 14a. This type of suggestive procedure has been criticized for producing inaccurate identifications. Thus, one of the four proposed rules recently recommended by scientific experts for accurate lineups or photospreads is that "[t]he suspect should not stand out in the lineup or photospread as being different from the distractors based on the eyewitness's previous description of the culprit or based on other factors that would draw extra attention to the suspect." *Recommendations for Lineups and Photospreads*, at 630. As the authors of that study explain, instances in which the sus-

pect stands out from the distractors severely detract from our ability to trust an identification:

> Perhaps the suspect stands out because s/he is the only one who fits the verbal description that the eyewitness had given the police earlier, or because the suspect is the only one dressed in the type of clothes worn by the culprit, or because the suspect's photo was taken from a different angle than the other photos. The presence of features that make the suspect stand out from the distractors confounds our ability to conclude that the selection of the suspect was due to true recognition versus some form of suggestion, demand, or inference.

Id. at 24 (internal citations omitted).

In light of the evidence undermining the empirical foundations on which the *Biggers* test rests, this Court should grant certiorari to reconsider the *Biggers* factors.

II. Review Should Be Granted Because A Series Of State Courts Of Last Resort Have Called Into Question The Continuing Validity Of The *Biggers* Factors And, Specifically, The Witness Certainty Factor.

Review in this case is warranted not only because the witness certainty factor applied in the federal courts is plainly unsupportable as a scientific matter, but also because that factor has been expressly rejected by a number of state courts of last resort.

In the years since this Court's decisions in *Biggers* and *Manson*, a series of state courts of last resort have concluded that, in light of the scientific evidence about the reliability of eyewitness identifications, application of the *Biggers* factors—and especially the witness-certainty factor—cannot adequately protect a defendant's due process rights. These courts have acted under their authority to interpret state constitutional provisions more strictly than the corresponding

provisions of the federal constitution, but their decisions do not rely on textual or structural differences between the state and federal constitutions. Rather, these courts have recognized that this Court's holding in *Biggers*, which was explicitly based on the Court's empirical analysis of the psychology of witness identification, is no longer tenable.

For example, in *State* v. *Long*, 721 P.2d 483 (Utah 1986), the Supreme Court of Utah held that trial courts must give cautionary instructions to the jury when the prosecution has presented evidence of a pre-trial eyewitness identification. The court recognized that "[t]here is no significant division of opinion" in the psychological literature on the unreliability of eyewitness identifications, but noted that juries routinely fail to understand how unreliable such testimony is. The court laid special emphasis on the proven invalidity of "the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection," noting that in some circumstances the accuracy of an identification is *inversely* related to the witness's apparent confidence. *Id.* at 490. The court specifically faulted this Court's approach in *Biggers*, noting that "several of the criteria listed by the Court [for determining reliability] are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies." *Id.* at 491.

The Utah Supreme Court followed the logic of *Long* to its inevitable conclusion in *State* v. *Ramirez*, 817 P.2d 774 (Utah 1991), holding that the *Biggers* test is an insufficient guarantee of due process under the Utah Constitution. See *id.* at 780-781. Rather than adopt a *per se* rule excluding unduly suggestive identifications, however, the court chose to fashion its own test, comparable to *Biggers* but "more empirically based" and more rooted in legitimate scientific consensus. See *id.* at 780. Among other differences, the court rejected the witness-certainty factor adopted in *Biggers* as empirically unsupported.

The Massachusetts Supreme Judicial Court went further in *Commonwealth* v. *Johnson*, 650 N.E.2d 1257 (Mass. 1995). Emphasizing the flaws in the empirical basis for this Court's holdings in *Biggers* and *Manson* (see *id.* at 1260 & n.5), and the "real threat to the truth-finding process of criminal trials" posed by suggestive eyewitness identification procedures (*id.* at 1261), the court held that the state constitution requires the *per se* exclusion of unnecessarily suggestive identifications. See *ibid.*

Most recently, after thirty years of adherence to the *Biggers* test, the Wisconsin Supreme Court has abandoned that approach. In *State* v. *Dubose*, 699 N.W.2d 582 (Wis. 2005), the court noted the wealth of new research over the past decade confirming that eyewitness testimony is often "hopelessly unreliable." *Id.* at 592 (quoting *Johnson*, 650 N.E.2d at 1262). Acknowledging that research and experience have undermined the foundations of the *Biggers* approach and shown the futility of attempting to distinguish between reliable and unreliable eyewitness testimony, the court adopted a new test: "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary." *Id.* at 593-594. Though the court's focus was on showups, it also applied its test to an out-of-court photo identification. See *id.* at 596.

In addition to the cases explicitly rejecting the *Biggers* approach under state constitutional law, numerous other decisions by state courts of last resort point to the growing consensus that eyewitness testimony based on a suggestive identification is unreliable, and specifically that the witness-certainty factor is a poor indicator of reliability.

For example, the Georgia Supreme Court recently instructed Georgia trial courts to "refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in decid-

ing the reliability of [an] identification." *Brodes* v. *State*, 614 S.E.2d 766, 771 (Ga. 2005).

Similarly, the Connecticut Supreme Court recently noted that "[t]he uncontradicted scientific literature * * * suggests that the fourth *Biggers* factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness * * * and the accuracy of that identification," *Ledbetter*, 881 A.2d at 311; see also, *e.g.*, *Jones* v. *State*, 749 N.E.2d 575, 586 (Ind. 2001) (recognizing "the growing body of scientific work which has challenged many commonly held beliefs about eyewitness credibility"); *Commonwealth* v. *Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (rejecting instruction authorizing jury to "take into account * * * the strength of the identification"); *Rimmer* v. *State*, 825 So.2d 304, 337 (Fla. 2002) (Pariente, J., dissenting in part) ("Since *Neil* [v. *Biggers*] was decided, additional social science research, as well as actual cases, have taught us much about the fallibility of eyewitness identification.").

Notably, none of the state cases discussed above relies on specific provisions of state constitutional or statutory law that differ substantially from federal law. Rather, these courts have all recognized that the empirical foundation upon which this Court's holding in *Biggers* and *Manson* rested—the assumption that a court can accurately determine the reliability of a suggestive identification—is no longer tenable.

Meanwhile federal courts struggle to do justice within the defective framework of *Biggers*. See, *e.g.*, *Abdur-Raheem* v. *Kelly*, 98 F. Supp. 2d 295, 306 (E.D.N.Y. 2000) ("The value of at least two of the factors—accuracy of the witness'[s] prior description and certainty at the confrontation—has been seriously questioned. Based on empirical research into eyewitness identifications, these factors assign too much predictive value to eyewitness confidence and also to witnesses' descriptions, neither of which is very predictive of identification accuracy in scientific studies") (internal quotation marks

omitted), *vacated on other grounds by, grant of writ of habeas corpus ordered by, Abdur Raheem* v. *Kelly*, 257 F.3d 122, 141 (2d Cir. 2001); *United States* v. *Singleton*, 702 F.2d 1159, 1179 (D.C. Cir. 1983) (Wright, J., dissenting) ("[I]nnumerable authorities have concluded that a witness'[s] degree of certainty in making an identification generally does not measure its reliability. Indeed, a *negative* correlation sometimes exists between a witness'[s] confidence and the accuracy of the identification.") (emphasis in original) (internal citations to psychological research omitted); *Ocasio* v. *Artuz*, No. 98-CV-7925(JG), 2002 U.S. Dist. LEXIS 9790, *34 n.7 (E.D.N.Y. May 24, 2002) ("In truth, social science has convincingly revealed that there is little or no correlation between an eyewitness'[s] confidence in an identification and the accuracy of the identification.") (citing psychological research); *Smith* v. *Smith*, No. 02 Civ. 7308 (WHP) (JCF), 2003 U.S. Dist. LEXIS 17642, *36-37 (S.D.N.Y. Sept. 29, 2003) ("Studies have indicated that the empirical evidence does not support the idea that eyewitness confidence is a valid measure of eyewitness accuracy under ecologically valid conditions. One reason for this phenomenon is the malleability of eyewitness confidence.") (internal citation and quotation marks omitted).

This is an area in which this Court's guidance is urgently needed. The court should grant certiorari to reconsider the *Biggers* test and, specifically, to consider whether a witness's degree of certainty has a legitimate role in the reliability inquiry.

III. Review Should Be Granted Because DNA Exonerations Of Individuals Whose Convictions Were Supported By Eyewitness Evidence Demonstrate That Continued Reliance On The *Biggers* Certainty Factor Undermines The Integrity Of The Judicial System.

The danger of allowing unreliable eyewitness evidence to go to the jury is dramatically demonstrated by recent DNA-

based exonerations. A report by the National Institute of Justice—a branch of the U.S. Department of Justice—reviewing 28 cases of defendants who were exonerated by DNA evidence concluded that "[i]n the majority of cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence." Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, Dept. of Justice Pub. No. NCJ 161258, 24 (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf. A subsequent study that added 12 cases to the 28 reviewed in the Department of Justice study found that *90%* of the wrongly convicted had been falsely identified through eyewitness testimony. *Recommendations for Lineups and Photospreads*, at 605. The study explained that in these 40 cases, "the kind of evidence that led to these wrongful convictions could have been anything. The fact that it happens to be eyewitness identification evidence lends support to the argument that eyewitness identification evidence is among the least reliable forms of evidence and yet persuasive to juries." *Ibid.*

The Innocence Project, a nonprofit legal organization dedicated to exonerating the wrongfully convicted, has reported that at last count 125 of the 163 defendants who have been exonerated through DNA evidence, or 77%, had convictions that were supported in part by eyewitness misidentifications. See http://www.innocenceproject.org/causes/mistakenid.php. In many of these cases, the exonerees tried to challenge the identification evidence used by the state as being suggestive. The courts found that the challenged identification evidence was reliable and admissible, contributing to a wrongful conviction. Only later after years of incarceration were these individuals exonerated through the use of DNA evidence. See *ibid.* These numbers should not be surprising given what we know about jurors overestimating eyewitness reliability and the fallibility of eyewitness identifications. See

also JIM DWYER, PETER NEUFELD, & BARRY SCHECK, ACTUAL INNOCENCE 41-77 (2000) (discussing misidentifcations and eyewitness testimony in cases of the wrongly convicted). The number of DNA exonerations where the conviction was based on eyewitness misidentifications demonstrates the inadequacy of the *Biggers* factors to determine the reliability of identification evidence once a court has determined the evidence was derived from suggestive procedures. And surely the number of defendants who, on the basis of misidentification, were wrongfully convicted of crimes for which no DNA evidence exists is many times the number exonerated by DNA testing. This is further evidence that the time has come for this Court to revisit *Biggers*.

IV. Stare Decisis Is No Bar To Granting The Petition.

"When governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. [The Court's] willingness to reconsider [its] earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63 (1996) (internal citations and quotation marks omitted).

In *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), the Court listed several factors to be considered when deciding whether to overturn one of its prior precedents. These factors include: "whether the rule has proven to be intolerable simply in defying practical workability"; "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 854-855 (internal citations and quotation marks omit-

ted). See also *Atkins* v. *Virginia*, 536 U.S. 304, 306-307 (2002) (overturning the Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1998) by evaluating the consensus reached by the "American public, legislators, scholars, and judges" in deliberating over the question whether executing mentally retarded persons violates the Eighth Amendment).

Several of these factors weigh strongly in favor of overturning the Court's decisions in *Biggers* and *Manson* to the extent that these decisions require courts to evaluate the level of certainty of a witness in determining the reliability of evidence that was derived from unnecessarily suggestive identification procedures.

Most importantly, the psychological research on eyewitness identifications has "robbed the old rule of significant application or justification" because the foundations of the Court's analysis have been undermined. The Court selected the level of certainty of the witness as one of the *Biggers* factors assuming that it would provide courts with an indication of the reliability of the identification. The consensus in the research literature on the certainty of a witness has shown that the Court's assumption is false. Because this is a constitutional rule, the Court must address this question as other courts are bound to follow this Court's precedent.

Overruling this portion of *Biggers* and *Manson* would not impose a special hardship because courts would still consider the other four *Biggers* factors, and would still be bound by the Court's primary holding that identification evidence that is the product of unnecessarily suggestive identification procedures must be determined to be independently reliable before such evidence is admitted to a jury.

Finally, although courts may find the "certainty" factor workable—in that it is a fact that can be readily determined—the "certainty" factor does not achieve its intended purpose of determining whether tainted evidence is nonethe-

less reliable. Therefore, the certainty factor is not "workable" in the most fundamental sense.

Thus, this Court should not rely on the principle of stare decisis to refuse to revisit *Biggers*, given the overwhelming consensus that the witness-certainty factor identified in *Biggers* is scientifically unsupportable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

V.

JOSE ANTONIO PEREZ, AKA TONY, RAYMOND PINA, AKA SHORTY, DEFENDANTS-APPELLANTS.

DOCKET NOS. 03-1445(L), 04-0751-CR(CON).

ARGUED: MAY 26, 2005.
DECIDED: JULY 11, 2005.

Before: CALABRESI, KATZMANN, and B.D. PARKER, Circuit Judges.

PER CURIAM.

Defendant-Appellant Jose Antonio Perez ("Perez"), a member of the "Perez Organization," appeals from the judgment of the district court (Arterton, J.), convicting him on five counts[1] related to the murder-for-hire killing of Theo-

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[1] The five counts were:

1. Conspiracy to commit murder-for-hire involving interstate travel or the use of an interstate facility, in violation of 18 U.S.C. § 1958,

2. Using interstate travel for murder-for-hire, with the intent that the murder be committed in violation of federal or state laws as consideration for the promise to pay something of value, 18 U.S.C. § 1958,

3. Using an interstate facility for murder-for-hire, with the intent that the murder be committed in violation of federal or state laws as consideration for the promise to pay something of value, 18 U.S.C. § 1958,

4. Committing a violate crime in aid of racketeering (VICAR), under 18 U.S.C. §§ 1959(b)(2), 1961, and

dore Casiano ("Casiano"), the leader of a rival narcotics organization in Hartford, Connecticut. Perez was sentenced to four concurrent terms of life imprisonment and one consecutive five-year term.[2]

Most of Perez's claims on appeal have been denied in an unpublished summary order, which we issue together with this opinion, see *United States* v. *Perez*, 138 Fed. Appx. 379 (2d Cir. 2005). We write here separately to address a question that, for this circuit, is one of first impression: whether a defendant can be convicted of using a facility in interstate commerce with the intent that a murder-for-hire be committed when the defendant's usage of that facility is wholly *intrastate*.

I.

In May 1996, in retaliation for the Savage Nomads' aggressive efforts to regain their share of the Hartford area's narcotics trade,[3] members of the Perez Organization decided that Casiano should be killed. Accordingly, a professional "hit man" (and his associates) from the Bronx was hired to travel to Connecticut to murder Casiano.

For purposes of the legal question before us, it suffices to say that one of Perez's responsibilities—and the only one

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5. Causing death by use of a firearm during a crime of violence, 18 U.S.C. §§ 924(c), 924(j)(1), 2.

[2] Raymond Pina, who was tried with Perez, withdrew his appeal prior to the date of oral argument.

[3] Casiano had been the leader of a gang called the Savage Nomads. The Nomads were, among other things, heavily involved in the sale of narcotics. While Casiano was in federal prison, the Savage Nomads' market share declined considerably—and they lost particular ground to the Perez Organization, which at all times was led by the appellant's brother, Wilfredo Perez. Ever since Casiano was released from prison in 1995, tension between the Savage Nomads and the Perez Organization ran high.

currently at issue—was to call Casiano on the telephone (as well as "page" his beeper) and invite him to a meeting, ostensibly to resolve their differences, at Perez Auto, a garage in Hartford owned by Wilfredo Perez. In fact, however, Perez was luring Casiano to the garage to give the hit men a clear opportunity to kill their target.

It was established at trial, by a representative of the local telephone company ("Southern New England Telephone" or "SNET"), that the calls made by Perez to Casiano on the day of the shooting were wholly intrastate calls. That is, the calls did not require any switching or routing connections outside of the State of Connecticut. As a general matter, however, SNET did provide local customers with access to long-distance calling plans and, as such, the SNET network was undeniably a facility involved in interstate communication.

II.

Perez argues that, because his calls to Casiano from Perez Auto were local and did not involve any interstate communication, he should not have been found guilty under 18 U.S.C. § 1958, which proscribes the use of interstate facilities in the commission of a murder-for-hire.[4]

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[4] Prior to amendment in 2004, 18 U.S.C. § 1958 read:

> Use of interstate commerce facilities in the commission of murder-for-hire
>
> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this

He notes that § 1958(a)—the substantive subsection of the provision, uses the language: "Whoever ... uses ... any facility in interstate ... commerce ...." (emphasis added). By contrast, § 1958(b)—the definitional subsection—describes "facility *of* interstate commerce" (emphasis added) to include means of transportation and communications. Perez therefore contends that the meaning in § 1958(a) is narrower than § 1958(b). In other words, whereas "use of a facility of interstate commerce" (subsection (b)) applies to any use of a facility that happens—at times—to be involved in interstate commerce, "use of a facility in interstate commerce" (subsection (a)) requires the defendant to have actually used the facility in its interstate capacity in furtherance of the murder-for-hire.

There is a circuit split on the question of whether the actual use by the defendant must be an interstate one. Supporting the position taken by the district court in the instant case—that is, not requiring an actual interstate usage—are opinions by the Fifth and Seventh Circuits. See *United States* v. *Marek*, 238 F.3d 310, 313 (5th Cir. 2001) (en banc) (holding that § 1958(a)'s "use of a facility in interstate commerce"

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title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $ 250,000, or both. (b) As used in this section and section 1959 [18 U.S.C. § 1959]—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

is synonymous with § 1958(b)'s "use of a facility *of* interstate commerce" and therefore that § 1958(a) satisfies the jurisdictional element of the federal murder-for-hire statute, irrespective of whether the particular usage in question was itself interstate or intrastate, so long as the facility is one involved in interstate commerce); *United States* v. *Richeson*, 338 F.3d 653, 660 (7th Cir. 2003) ("We wholly agree with the Fifth Circuit that § 1958's construction, plain language, context in the realm of commerce clause jurisprudence, and legislative history all lead to the conclusion that 'it is sufficient [under § 1958] that the defendant used an interstate commerce facility in an *intra* state fashion.'" (quoting *Marek*, 238 F.3d at 315)).

Bolstering Perez's claim, at least to a limited extent, is an opinion of the Sixth Circuit, as well as two district court decisions in our circuit. See *United States* v. *Weathers*, 169 F.3d 336, 341-43 (6th Cir. 1999) (holding that the communication itself involved in the murder-for-hire conspiracy must affect interstate commerce); *United States* v. *Paredes*, 950 F. Supp. 584, 590 (S.D.N.Y. 1996) (holding that an intra state "page" was insufficient to establish jurisdiction even when pager company itself also had the capacity to transmit—and regularly did transmit—its signals inter state); *United States* v. *Stevens*, 842 F. Supp. 96, 98 (S.D.N.Y. 1994) (holding that intra state "page" to a beeper was sufficient to establish murder-for-hire jurisdiction only because the pager company transmitted its signals through an interstate facility). But see *United States* v. *Cope*, 312 F.3d 757, 771 (6th Cir. 2002) (limiting *Weathers* to its facts).

We adopt the reasoning of *Marek* and today hold that the phrases "facility of interstate commerce" and "facility *in interstate* commerce" are to be used *interchangeably*. See *Marek*, 238 F.3d at 321. Moreover, we agree with the Government's argument that taking "in" and "of" to connote different scopes of coverage is difficult to square with the structure of the statute, which makes "the use of a facility *in*

interstate commerce" part of the substantive law of § 1958(a), and defines "facility *of* interstate commerce" in § 1958(b). If the phrases have different meanings, then § 1958(b) defines a phrase with no application to the substantive offense, and leaves undefined the phrase that does appear in the substantive law.[5] We note that the question we settle today will have little importance going forward, as Congress has recently amended the statute to eliminate any confusion over the scope of § 1958(a).

III.

As a result, even though Perez's calls to Casiano were wholly intrastate communications, the fact that they were made using the SNET network, a facility involved in interstate commerce, leads us to conclude that Perez was properly subject to prosecution for using interstate commerce facilities in the commission of murder-for-hire. Accordingly, we AFFIRM the judgment of the district court.

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[5] The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, in part amended § 1958(a) by striking "facility in" and replacing it with "facility of." This specific amendment was entitled "Clarification of Definition" and purported to seek to eliminate any confusion that had previously existed, as evidenced by the circuit split. Because we agree with the Fifth Circuit, we, also, view what Congress was doing as clarifying rather than expanding the scope of the criminal law.

APPENDIX B

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

V.

JOSE ANTONIO PEREZ, AKA TONY, RAYMOND PINA, AKA SHORTY, DEFENDANTS-APPELLANTS.

DOCKET NO. 03-1445.

JULY 11, 2005.

Appeal from the United States District Court for the District of Connecticut (Arterton, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the case be AFFIRMED.

Present: CALABRESI, KATZMANN, and B.D. PARKER, Circuit Judges.

SUMMARY ORDER

Defendant-Appellant Jose Antonio Perez ("Perez") was convicted by a jury on five counts related to the murder-for-hire killing of Theodore Casiano, the leader of a rival narcotics organization in Hartford, Connecticut, and sentenced to four concurrent terms of life imprisonment and one consecutive five-year term. We assume familiarity with the facts, the procedural history, and the issues on appeal, and also cross-reference this panel's accompanying per curiam, which addresses a question of law that this circuit has not previously had occasion to consider. See *United States* v. *Perez*, 414 F.3d 302 (2d Cir. 2005).[1]

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[1] Raymond Pina, who was tried with Perez, withdrew his appeal prior to the date of oral argument.

On appeal from his conviction and sentence from the judgment of the district court (Arterton, J.), Perez raises a cavalcade of claims centered around seven principal allegations: (1) that, because he joined the criminal enterprise only after that crime had been completed, the district court erred in denying his Rule 29(c) motion for judgment of acquittal on several federal murder-for-hire counts, 18 U.S.C. § 1958; (2) that, because 18 U.S.C. § 1959 does not cover the act of aiding and abetting in the commission of predicate violent crimes in aid of racketeering ("VICAR") offense, the district court erred in denying his Rule 29(c) motion for judgment of acquittal on one count of aiding and abetting in the commission of a "VICAR" murder, under that section of the criminal code; (3) that the district court erred in failing to instruct the jury on the elements of aiding and abetting under Connecticut law; (4) that, because he was not acting in furtherance of any racketeering enterprise, Perez could not be held liable under the VICAR statute; (5) that the district court committed clear error in admitting a suggestive and unreliable out-of-court identification; and (6) that the district court abused its discretion in admitting testimony regarding his co-conspirators' possession of weapons and narcotics. A seventh claim, involving the question of whether a conviction for using a facility in interstate commerce in the commission of a murder-for-hire is appropriate when the actual usage of that facility by the defendant in a particular instance is wholly intrastate, raises issues of first impression that require a published opinion.

Perez's argument, that he could not be part of the conspiracy to commit federal murder-for-hire because that conspiracy was completed before he ever became involved, is without merit. Irrespective of whether his co-conspirators satisfied the basic elements of conspiracy prior to Perez's arrival, the fact that there were more instances of planning murder-for-hire using interstate travel and facilities *after*

Perez joined is sufficient to establish a basis for his conviction.[2]

Perez claims that 18 U.S.C. § 1959(a) does not apply to persons who only aid and abet another individual in the commission of a predicate VICAR offense. But, "murder" in § 1959(a) is defined according to the state or federal law controlling the predicate murder offense. See *United States* v. *Mapp*, 170 F.3d 328, 335-36 (2d Cir. 1999). Under Connecticut law, Conn. Gen. Stat. §§ 53a-54a, 53a-8, and under the federal murder-for-hire provision, 18 U.S.C. § 1958, accomplice liability is built into the respective murder statutes—and therefore Perez's aiding and abetting constitutes murder under the VICAR statute, too.

Perez's argument that the district court failed to instruct the jury on the elements of aiding and abetting under Connecticut state law, too, is without merit. Given that the district court issued the comparable federal aiding-and-abetting charge and also given the fact that we review only for plain error (since Perez failed to object at the time of the charge), we reject this claim. See *United States* v. *Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *United States* v. *Whab*, 355 F.3d 155, 158 (2d Cir. 2004).

With respect to the contention that Perez was not acting to further a racketeering enterprise, we conclude that there was sufficient evidence for the jury to find that he had been doing precisely that. See *United States* v. *Bruno*, 383 F.3d 65, 83 (2d Cir. 2004).

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[2] Because Perez's corollary claims—(a) that he cannot be convicted of using interstate travel to commit federal murder-for-hire, (b) that he cannot be convicted of aiding and abetting federal murder-for-hire, and (c) that he cannot receive a firearm enhancement in conjunction with federal murder-for-hire—rest entirely on this same argument, they likewise are unavailing.

The claim that the district court improperly admitted a suggestive and unreliable out-of-court identification also fails. The district court conducted a multi-day Wade hearing, see *United States* v. *Wade*, 388 U.S. 218 (1967), and reasonably determined that though the procedures used in obtaining the identification of Perez were suggestive, the identification by one of his co-conspirators was itself reliable. See *Raheem* v. *Kelly*, 257 F.3d 122, 133 (2d Cir. 2001); see also *United States* v. *Simmons*, 923 F.2d 934, 950 (2d Cir. 1991) (noting that an out-of-court identification tainted by procedures which were unduly suggestive may still be admissible if "it possesses sufficient indicia of reliability"). Based on the district court's analysis in accordance with the five-part reliability test, see *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), we conclude that there was no clear error. See *United States* v. *Finley*, 245 F.3d 199, 203 (2d Cir. 2001).

Finally, the district court did not abuse its discretion in admitting testimony regarding the possession of weapons and narcotics by Perez's co-conspirators. See *United States* v. *Becerra*, 97 F.3d 669, 671 (2d Cir. 1996).

We have here considered all of Perez's claims, except for those involving whether Perez was properly convicted for using a facility in interstate commerce in the commission of murder-for-hire, and find the ones addressed above to be without merit. The judgment of the district court is therefore AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT, D. CONNECTICUT

UNITED STATES

V.

PEREZ ET AL.

NO. 3:02CR7 (JBA).

MARCH 7, 2003.

Ruling on Motion to Suppress Identification [Doc. # 264]

ARTERTON, District Judge.

Defendant Jose Antonio Perez has moved to suppress a December 10, 2001 photo array identification of him by Mario Lopez and any in court identification of him based on the photo array. A *Wade* hearing[1] was held at which DEA Special Agent Chris Matta and Lopez testified, and pertinent notes from Government interviews with Lopez were introduced into evidence. For the reasons set out below, the motion is DENIED.

I. Background

At the hearing, Agent Matta testified that during a May 25, 2001 interview with Lopez, Lopez described the "owner" of Perez Auto (a Hartford auto repair shop Lopez was taken to on May 23 and 24, 1996) as having a ponytail, being eight

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[1] See *United States* v. *Wade*, 388 U.S. 218 (1967); see also *Watkins* v. *Sowders*, 449 U.S. 341, 349 (1981) ("A judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable.").

years older than Lopez, and having no facial hair.[2] Notes taken by the Assistant U.S. Attorney during that same interview recount that Lopez described the owner as "dark skinned." At the December 10, 2001 identification session, the DEA report prepared by Matta recounts Lopez's description of the "owner" as looking "indian" (but not Native American or from India) because the "owner" was dark and had what Lopez called a year-round tan. Lopez also stated that the "owner" had long hair and facial hair.[3] Agent Matta's notes of the December 10, 2001 interview use the descriptor "indian" seven times in reference to the "owner." At the December 10, 2001 interview, Lopez was shown three photo arrays. He identified defendant Raymond Pina by name, designated defendant Wilfredo Perez as looking familiar, and

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[2] While defendant's post-hearing brief [Doc.# 359] states that Lopez described the "owner" as being taller than he (Lopez) and weighing between 175 and 190 pounds, this is not supported by the testimony at the hearing or the exhibits, as this description (found in Agent Matta's May 25, 2001 notes [Ex. B]) is in reference to Ollie Berrios: the notes first describe someone as having long hair, being eight years older than Lopez, having a ponytail and no facial hair, and then (several lines down) describe a second "brother." This second brother is described as taller than Lopez and between 175 and 190 pounds. Agent Matta's testimony at the hearing made clear that the only description given by Lopez of the "owner" at the May 25, 2001 meeting was of the "owner" as having long hair, being eight years older than Lopez, having a ponytail and no facial hair. Defendant's confusion no doubt arises from the confusing label of "brother" given to both the "owner" and Berrios, although this labeling choice is explained by Agent Matta's belief at the time that Berrios and the "owner" were brothers (hence both would be appropriately labeled "brother").

[3] There is a discrepancy as to whether Lopez's description of the "owner" prior to the December 10, 2001 interview included having facial hair. Matta testified that Lopez had so stated but was unable to reference any report or interview notes reflecting such a description.

identified Jose Antonio Perez as the "owner." Lopez was once again shown the Wilfredo Perez photo array, about which he said the person he designated as familiar looked like the "owner" but his face was too fat and his complexion too light.

At the *Wade* hearing, Lopez testified that he had met the "owner" on two consecutive days at the auto shop in the summer of 1996, but could not specify the dates or the city in which the shop was located. Lopez testified that the "owner" was five feet eight inches to five feet ten inches tall, weighed between 180 and 200 pounds, had hair tied in a ponytail, and was Puerto Rican. He testified that the "owner" was wearing a motorcycle jacket and leather boots, jeans, possibly a gold chain tucked under his t-shirt. He stated that the "owner" was older than he (Lopez), possibly between 37 and 40 years of age. He described the owner as looking "indian," which he specified meant dark-skinned or light dark-skinned. Finally, he described the "owner" as having light facial hair and possibly a full goatee.

II. Analysis

"When objection is made to a pre-trial identification, an analysis of whether the witness may identify the defendant at trial generally involves a two-step inquiry." *United States* v. *Tortora*, 30 F.3d 334, 338 (2d Cir. 1994). First, the Court must determine whether the identification procedures "unduly and unnecessarily suggested that the defendant was the perpetrator." *Raheem* v. *Kelly*, 257 F.3d 122, 133 (2d Cir. 2001). If not, there is no due process obstacle to admissibility of a subsequent in court identification, and the reliability of an eyewitness identification is a matter for the jury. *Id.* (citations and quotations omitted). "If the court finds, however, that the procedures were suggestive, it must then determine whether the identification was nonetheless independently reliable. * * * In sum, the identification evidence will be admissible if (a) the procedures were not suggestive or (b) the

identification has independent reliability." *Id.* (citations omitted); see also *Manson* v. *Brathwaite*, 432 U.S. 98, 112 (1977) ("*Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.").

On every occasion that Lopez has been asked to describe the "owner" (the May 25 and December 10, 2001 interviews, as well as the *Wade* hearing) his description has included the subject's dark skin, and he specifically distinguished the photograph of Jose Antonio Perez (whom he identified as the "owner") from the photograph of Jose Antonio Perez's similar-looking brother, Wilfredo Perez, on the grounds that, *inter alia*, Jose Antonio Perez had a darker complexion. In the eight photographs presented in the photo array, Jose Antonio Perez's photograph is undisputedly the darkest, notably more so than all others. While Jose Antonio Perez does not appear in court to be a markedly dark-skinned person, what is relevant is that Lopez considered him dark-skinned after seeing him during the two-day period in 1996. See *Raheem*, 257 F.3d at 134 ("Where one witness has emphasized a particular characteristic of the perpetrator in giving a description to the police, a lineup in which only the defendant has that characteristic may well taint the identification of the defendant only by that viewer."). Given Lopez's repeated reference to Jose Antonio Perez's dark complexion on every occasion, and given his further use of Jose Antonio Perez's skin color as a distinguishing referent in examining another photo array, the Court concludes that the use of Jose Antonio Perez's dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure which was unduly suggestive to Lopez. See *id.* at 135-137 (lineup in which defendant appeared in a black leather coat was suggestive to two witnesses who had given the police descriptions that emphasized the suspect's black leather coat); *United States* v. *Eltayib*, 88 F.3d 157, 166-167 (2d Cir. 1996) (photo array unduly suggestive where witness had described

perpetrator as having "a head full of hair, real bushy hair, afro-type hair," defendant's photo was the only one showing a full head of hair, and the other photos pictured subjects with darker skin than the defendant).[4]

The Court's conclusion that the December 10 photo array was unduly suggestive does not end the matter, however, as the suggestive pretrial identification and any subsequent in-court identification may still be admissible if such identifications are nonetheless independently reliable. See *United States* v. *Simmons*, 923 F.2d 934, 950 (2d Cir. 1991) ("even a suggestive out-of-court identification will be admissible if, when viewed in the totality of the circumstances, it possesses sufficient indicia of reliability") (citation omitted); *United States* v. *Salameh*, 152 F.3d 88, 126 (2d Cir. 1998) ("A witness who identified a defendant prior to trial may make an in-court identification of the defendant if ... the in-court identification is independently reliable, even though the pretrial identification was unduly suggestive.") (citations omitted). The standard for assessing independent reliability is almost identical for both pretrial identifications and subsequent in-court identifications, see *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972); see also 2 LaFave et al., Criminal Procedure § 7.4(c)

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[4] The dispute over whether Lopez had described Perez as having facial hair or not is immaterial to the question of undue suggestion because the presence or absence of facial hair would not have made Perez's photo stand out from the others: each photograph in the array pictured a subject with facial hair. See *United States* v. *Thai*, 29 F.3d 785, 808 (2d Cir. 1994) ("If there is nothing inherently prejudicial about the presentation, such as use of a very small number of photographs or the utterance of suggestive comments before an identification is made, the principal question is whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit.") (internal citations, quotations and alterations omitted).

at 673-674 (2d ed. 1999)[5], requiring evaluation of the "totality of circumstances," *Neil*, 409 U.S. at 199. In making this determination, the factors to be considered "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

Having spent some time with Jose Antonio Perez on two consecutive days, Lopez had a significant opportunity to view him. Lopez testified that on the first day, he saw the "owner" (the man he subsequently identified in the photo spread in question) in the office and bay area of the Perez auto shop and outside in front of the garage. He was with Jose Antonio Perez in the office for between five and fifteen minutes, then walked outside with him to view a Grand National which Jose Antonio Perez owned in which Lopez was interested, for between five and ten minutes. On the second day, he again saw Jose Antonio Perez when the latter came into the office and mechanics' bay area. He recalled overhearing a conversation between Ollie Berrios and Jose Antonio Perez in which Jose Antonio Perez stated that once the job was complete, he was going to give the money to his "brother," referring to Berrios. Later that day, Lopez saw Jose Antonio Perez in the bay area making a telephone call, and subsequently saw him come into the office area and speak with the victim. These repeated opportunities to view Jose Antonio Perez are strong evidence of independent reliability.

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[5] "It is unlikely but theoretically possible that there could be a risk of misidentification which was substantial but not irreparable, meaning that ... the pretrial identification would be suppressed but not the at-trial identification by the same person." (footnote omitted).

Lopez's degree of attention adds somewhat to the reliability of his identification of Jose Antonio Perez. Lopez testified that he was aware by the second day of his role in the events (that he would be driving the motorcycle from which a shooter would kill the victim), thus supporting an inference that "the circumstances prompted a high degree of attention by the witness." LaFave, *supra*, § 7.4(c) at 675 (footnote omitted). This inference is buttressed by Lopez's ability to remember in great detail the layout of the auto shop, as well as details such as the make of a car (Corvette) on the lift in the shop and the color of the van (sky blue) in which he was riding.[6] Lopez's testimony at the hearing, with its relatively detailed description of the "owner," further shows that Lopez had a high degree of attention. The otherwise strong showing on this factor is diminished somewhat, however, by Lopez's statements on cross examination that his memory was not

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[6] Defendant discounts Lopez's degree of attention, arguing that he was able to recall only details of those things he cared about (automobiles and motorcycles in the shop), and not facial features or other physical characteristics of the people he observed. This contention is belied by Lopez's relatively detailed *Wade* hearing description of Jose Antonio Perez. While Lopez's May 25 and December 10, 2001 descriptions of Jose Antonio Perez to Agent Matta are less than comprehensive, the record is scant as to what degree of detail was sought by Agent Matta's questions about Jose Antonio Perez's appearance. Finally, there is no evidence that Lopez's recollection was in any way bolstered or aided prior to the *Wade* hearing, and thus no reason to believe that his detailed *Wade* hearing description of Jose Antonio Perez does not reflect his true attention to detail during the 1996 encounter.

Similarly, defendant's contention that Lopez's belief that Jose Antonio Perez "owned" the garage (when in fact Jose Antonio Perez does not actually hold title to the garage) shows Lopez's lack of attention to detail (and thus undercuts the reliability of Lopez's independent recollection) lacks merit. The record is silent as to why Lopez considered Jose Antonio Perez to be the "owner" and thus it is unknown what caused his erroneous belief.

good because of stress and that at times he was not paying particular attention to the owner.

The accuracy of Lopez's description of Jose Antonio Perez weighs slightly in favor of a conclusion of independent reliability. Lopez's *Wade* hearing description of the "owner" as between 37 and 40 at the time of their summer 1996 encounter is close to Jose Antonio Perez's January 2, 1960 date of birth.[7] While defense counsel argues that the description given by Lopez at the hearing is inaccurate because Jose Antonio Perez is allegedly only five feet seven inches[8] (while Lopez testified five feet eight inches to five feet ten inches tall), the difference in perceived height of an inch or two is not significant, particularly as it could be attributable to the heel height of the leather boots that Lopez testified Jose Antonio Perez had been wearing. Cf. *Dunnigan* v. *Keane*, 137 F.3d 117, 130 (2d Cir. 1998) (two inch height discrepancy in identification was not substantial "given that, while in [the witness's] presence, the robber was not standing still but was squatting, running, or sitting"). The facial hair issue detracts somewhat, however, because the photograph of Jose Antonio Perez used in the photo array (which was taken close in time to Lopez's 1996 meeting with Jose Antonio Perez[9] distinctly shows Jose Antonio Perez with facial hair (both a goatee and a mustache), but Lopez initially told Matta that Jose Antonio Perez had no facial hair (although he may have later described him with facial hair, see *supra* note 3) and testified at the hearing that Jose Antonio Perez had only a light mustache and possibly a goatee.

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[7] See Govt's Response Ex. E (Hartford Police mug shot listing Jose Antonio Perez's date of birth).

[8] There is no evidence of his actual height in the record.

[9] As defendant's post-hearing brief notes, see [Doc. # 359] at 4, Agent Matta testified that the photo of Jose Antonio Perez used in the photo array was taken on June 1, 1996.

Lopez's level of certainty in his identification of Jose Antonio Perez also weighs in favor of a conclusion of independent reliability. In contrast to Lopez's designation of Wilfredo Perez's photograph only as looking familiar (and not as someone he recalled seeing at the auto shop on either of the two days in 1996), he testified to no uncertainty as to his identification of Jose Antonio Perez as the owner. Defense counsel concedes that Lopez appeared certain of this identification.

The five year time lapse between Lopez's observing Jose Antonio Perez and Lopez's selecting his photo from the photo array weighs against a finding of independent reliability, as the Government concedes. *Cf. Neil*, 409 U.S. at 201 ("There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases."). Further time will have passed before any in-court identification is made. This significant lapse is not dispositive, however, as similar lapses have not automatically presented insurmountable barriers. See *United States* v. *Kwong*, 69 F.3d 663, 667 (2d Cir. 1995) (five year passage of time outweighed by other factors evidencing reliability) (*citing Tortora*, 30 F.3d at 338-339 (same) and *United States* v. *Hill*, 967 F.2d 226, 232-233 (6th Cir. 1992) (same)).

In considering the *Neil* factors in light of the totality of the circumstances, the Court concludes that Lopez's significant opportunity to view Jose Antonio Perez, coupled with the showing of a fair degree of attention and significant level of certainty, is sufficient to counterbalance: (1) the lengthy passage of time between the 1996 encounter and both the 2001 identification and any future in-court identification, and (2) "the corrupting effect of the suggestive confrontation," *Dunnigan*, 137 F.3d at 128 (citations omitted). Lopez's two-day opportunity to view Jose Antonio Perez significantly exceeded what has been held sufficient in other cases. See, *e.g.*, *United States* v. *Wong*, 40 F.3d 1347, 1360 (2d Cir. 1994)

(two to three seconds during restaurant murder); Salameh, 152 F.3d at 126-127 (time spent pumping gas); *United States* v. *Jacobowitz*, 877 F.2d 162, 168 (2d Cir. 1989) (five minutes in a well-lighted hotel lobby plus a "brief[]" delivery of tickets to hotel room); see also *United States* v. *Frank*, No. 97cr269(DLC), 1998 WL 292320 at *3 (S.D.N.Y. June 3, 1998) (summarizing additional cases); cf. *Ocasio* v. *Artuz*, No. 98-CV-7925(JG), 2002 WL 1159892 at *11 (E.D.N.Y. May 24, 2002) (independent reliability based almost exclusively on witness's extensive opportunity to view defendant).

The Court's conclusion is one of "a threshold level of reliability" only, with doubts about the reliability of the identification "go[ing] only to the identification's weight, not to its admissibility," *Dunnigan*, 137 F.3d at 128 (citations omitted), and the significant time gap will presumably be fertile ground for cross examination and argument to the jury:

> It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart the 'integrity' of the adversary process. Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Manson, 432 U.S. at 113 n. 14 (quoting *Clemons* v. *United States*, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring)) (internal quotations and alterations omitted).

III. Conclusion

For the reasons set out above, the Court concludes that although the photo array was unduly suggestive, there exists a sufficient independent basis for Lopez's identification of Jose Antonio Perez such that admitting Lopez's identification testimony would work no due process violation. Jose Antonio Perez's motion to suppress identification testimony [Doc. # 264] is DENIED.

IT IS SO ORDERED.

JAN 30 2006
OFFICE OF THE CLERK

No. 05-596

In the Supreme Court of the United States

JOSE ANTONIO PEREZ, AKA TONY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Neil v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), hold that, in deciding whether an out-of-court identification was reliable, and therefore admissible, despite an unduly suggestive identification procedure, a trial court should consider a number of factors, including the level of certainty demonstrated by the witness. The question presented is whether *Biggers* and *Brathwaite* should be overruled insofar as they include the witness's certainty on the list of factors to be considered.

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In the Supreme Court of the United States

No. 05-596

JOSE ANTONIO PEREZ, AKA TONY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 7a-10a) is not published in the *Federal Reporter* but is reprinted in 138 Fed. Appx. 379. The opinion of the district court (Pet. App. 11a-21a) is reported at 248 F. Supp. 2d 111. An opinion of the court of appeals deciding an issue not raised in the petition (Pet. App. 1a-6a) is reported at 414 F.3d 302.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2005. On October 5, 2005, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 10, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiracy to commit murder for hire, interstate travel to commit murder for hire, and using an interstate facility to commit murder for hire, in violation of 18 U.S.C. 1958; committing a crime of violence in aid of racketeering, in violation of 18 U.S.C. 1959; and causing death by use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and (j)(1). He was sentenced to four concurrent terms of life imprisonment and one consecutive term of five years of imprisonment. The court of appeals affirmed.

1. After his release from federal prison in early 1995, Teddy Casiano returned to Hartford, Connecticut, where he resumed his leadership of a gang called the Savage Nomads. In the meantime, a family-based drug organization led by Wilfredo Perez, David Perez, and petitioner (the Perez organization) had been reaping large profits through the sale of kilogram quantities of cocaine at an establishment in Hartford called the Hour Glass Café. Casiano became angry that the Perez organization refused to pay sufficient respect to the Savage Nomads and did not provide him with a greater share of the profits from its drug business. In late 1995, Casiano and his gang kidnapped Ollie Berrios, a member of the Perez organization; forced him to reveal where the Perezes kept their drugs and money; and then stole a large quantity of cocaine and cash. Gov't C.A. Br. 5-9.

Tensions between Casiano and the Perez organization continued to mount until, in May 1996, Wilfredo Perez concluded that Casiano had to be killed. Berrios and his friend Santiago Feliciano recruited Fausto Gon-

zalez and Mario Lopez to do the job. Together with Berrios and Feliciano, Gonzalez and Lopez then met with Wilfredo Perez and petitioner at Perez Auto, a garage that Wilfredo Perez owned and operated, to plan the murder. Gov't C.A. Br. 9-12.

The next day, May 24, 1996, Gonzalez and Lopez traveled from the Bronx, New York, to Connecticut and again met with Wilfredo Perez and petitioner. Wilfredo Perez gave Berrios $6000 to pay Gonzalez once Casiano was killed, and petitioner agreed to let Berrios use his Cadillac to take Gonzalez and Lopez back to New York after the killing. Wilfredo Perez and petitioner then lured Casiano to the garage. After Casiano left, Lopez and Gonzalez followed him on a motorcycle driven by Lopez. The motorcycle pulled up to Casiano's car, and Gonzalez killed Casiano by shooting him several times at point-blank range. Once Gonzalez and Lopez were in petitioner's Cadillac, Berrios gave Gonzalez the $6000. Petitioner was observed at the scene of Casiano's murder, and acknowledged that Casiano had been at the garage shortly before the killing. Gov't C.A. Br. 12-17.

2. A few months after Casiano's murder, members of the Perez organization, including petitioner, were indicted on federal drug charges. Petitioner ultimately pleaded guilty to conspiracy to distribute more than five kilograms of cocaine. In January 2002, petitioner, Wilfredo Perez, and others were charged in a separate indictment with five offenses relating to Casiano's murder. Gov't C.A. Br. 3-4, 17.

3. On December 10, 2001, in an out-of-court photo-array identification procedure, Lopez had identified petitioner, among the eight men depicted in the array, as the "owner" of Perez Auto. Petitioner filed a motion to suppress the identification, on the ground that the photo

array was unduly suggestive. He argued that Lopez had described the "owner" as having dark skin, and that petitioner had the darkest skin of any of the men pictured in the array. Pet. App. 11a, 14a.

The district court held a hearing pursuant to *United States* v. *Wade*, 388 U.S. 218 (1967), to determine whether to admit Lopez's out-of-court identification at petitioner's trial. Chris Matta, a Special Agent with the Drug Enforcement Administration, and Lopez testified at the hearing. Lopez described the "owner" of Perez Auto in significant detail, based on their two meetings at the garage. Pet. App. 11a-13a.

4. The district court denied the motion to suppress. Pet. App. 11a-21a.

The court agreed with petitioner that the use of his "dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure which was unduly suggestive." Pet. App. 14a. Recognizing that a "suggestive pretrial identification and any subsequent in-court identification may still be admissible if such identifications are * * * independently reliable," *id.* at 15a, the court then applied the standard for assessing independent reliability set forth in *Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). Under that standard, the court said, it was required to evaluate the "totality of the circumstances," including "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Pet. App. 16a (quoting *Biggers*, 409 U.S. at 199-200). Of those five

factors, the court determined that four weighed in favor of an independently reliable identification. *Id.* at 16a-20a.

First, the court found that Lopez had "spent some time with [petitioner] on two consecutive days," and thus had had "a significant opportunity to view him." Pet. App. 16a. The court concluded that Lopez's "repeated opportunities to view [petitioner] are strong evidence of independent reliability." *Ibid.* Indeed, the court noted that "Lopez's two-day opportunity to view [petitioner] significantly exceeded what has been held sufficient in other cases." *Id.* at 19a-20a (citing cases).

Second, the court found that "Lopez's degree of attention adds somewhat to the reliability of his identification." Pet. App. 17a. The court relied, in part, on "Lopez's ability to remember in great detail the layout of the auto shop, as well as details such as the make of a car (Corvette) on the lift in the shop and the color of the van (sky blue) in which he was riding." *Ibid.* Pointing to Lopez's "relatively detailed" description of petitioner at the *Wade* hearing, the court rejected petitioner's contention that Lopez did not pay close attention to "facial features or other physical characteristics of the people he observed." *Id.* at 17a n.6.

Third, the district court found that "[t]he accuracy of Lopez's description of [petitioner] weighs slightly in favor of a conclusion of independent reliability." Pet. App. 18a. The court relied on Lopez's "*Wade* hearing description of the 'owner' as between 37 and 40 at the time of their summer 1996 encounter," which is consistent with petitioner's "January 2, 1960 date of birth." *Ibid.* Rejecting petitioner's argument that Lopez's description at the hearing was inaccurate, the court explained that the difference "of an inch or two" between

Lopez's description of petitioner's height and his actual height was "not significant, particularly as it could be attributable to the heel height of the leather boots that Lopez testified [petitioner] had been wearing." *Ibid.*

Fourth, the district court found that "Lopez's level of certainty in his identification of [petitioner] also weighs in favor of a conclusion of independent reliability." Pet. App. 19a. The court noted that Lopez had "testified to no uncertainty as to his identification" of petitioner, and that defense counsel had "concede[d] that Lopez appeared certain of [] his identification." *Ibid.*

The only factor found by the district court to weigh against the independent reliability of Lopez's identification was the "time lapse between Lopez's observing [petitioner] and Lopez's selecting his photo from the photo array." Pet. App. 19a. Noting that "similar lapses have not automatically presented insurmountable barriers" to the admission of identification evidence, the court determined that the time lapse was "not dispositive," and that the other factors were "sufficient to counterbalance" it. *Ibid.* (citing cases). The court emphasized that it was ruling only on the admissibility of the identification, not on its weight, and that the lapse of time between Lopez's meetings with petitioner and his photo identification would "presumably be fertile ground for cross examination and argument to the jury." *Id.* at 20a (citing *Brathwaite*, 432 U.S. at 113 n.14).

5. At trial, the photo array and Lopez's identification of petitioner were admitted over petitioner's objection. In addition, Berrios and Feliciano testified that petitioner was involved in Casiano's murder, and Casiano's girlfriend, Maritza Alvarez, testified that petitioner had tried to lure Casiano to Perez Auto on the day of his murder. Pet. C.A. Br. 9; Gov't C.A. Br. 15, 61-62.

The jury found petitioner guilty on all five counts. The district court sentenced him to a prison term of life plus five years. Gov't C.A. Br. 4-5.

6. Petitioner raised a number of claims on appeal, including a challenge to the admission of Lopez's out-of-court identification. The court of appeals affirmed, rejecting one of petitioner's claims in a published opinion and his remaining claims, including his challenge to the admission of the identification, in an unpublished summary order. Pet. App. 1a-6a, 7a-10a. The court rejected petitioner's identification claim in a single paragraph. *Id.* at 10a. It noted that the district court had "conducted a multi-day Wade hearing" and had "reasonably determined that though the procedures used in obtaining the identification of [petitioner] were suggestive, the identification by one of his co-conspirators was itself reliable." *Ibid.* "Based on the district court's analysis," the court of appeals concluded, "there was no clear error" in the admission of Lopez's identification. *Ibid.*

ARGUMENT

In *Neil* v. *Biggers*, 409 U.S. 188 (1972), and again in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), this Court considered when due process requires the exclusion of identification evidence following an out-of-court identification. Under those decisions, if the identification procedure was not unduly suggestive, the identification is admissible without further inquiry, and if the procedure *was* unduly suggestive, the identification is admissible as long as the identification is independently reliable. 432 U.S. at 107-117; 409 U.S. at 196-201. In both *Biggers* and *Brathwaite*, the Court listed factors to be considered in determining whether, despite an unduly suggestive procedure, the identification was reliable.

432 U.S. at 114; 409 U.S. at 199-200. One of those factors is the level of certainty of the witness. 432 U.S. at 114; 409 U.S. at 199. Relying on scientific studies addressing the correlation between a witness's certainty and the accuracy of the identification, petitioner contends (Pet. 3-20) that witness certainty should be removed from the list of factors to be considered.

Certiorari should be denied. First, the scientific evidence is not one-sided, and certainly is not sufficiently one-sided to justify overruling *Biggers* and *Brathwaite* in part. Second, despite petitioner's claim that the empirical foundations of *Biggers* and *Brathwaite* have washed away, no division of authority has emerged in the lower courts on whether the rule petitioner advocates is required by federal due process. Third, petitioner's claim was not adequately presented to, and was not passed upon by, the court of appeals. Finally, this case is also an unsuitable vehicle for deciding the question presented because adoption of petitioner's rule would have no effect on the outcome.

1. Petitioner does not challenge the applicable constitutional standard, which is "whether under the 'totality of the circumstances' the identification was reliable even though the [identification] procedure was suggestive." *Biggers*, 409 U.S. at 199. On the contrary, he acknowledges (Pet. 4) that "reliability is the linchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114. Petitioner's claim is much narrower. He contends that, in deciding whether the identification was reliable, trial courts should be prohibited from considering "the level of certainty demonstrated by the witness." *Biggers*, 409 U.S. at 199. But certainty is not the only, or even the primary, basis for a finding of reliability; it is one of five

factors identified by the Court, and the list is not exhaustive. See *Brathwaite*, 432 U.S. at 114 (factors "include" five identified by Court); *Biggers*, 409 U.S. at 199 (same). As explained below, there is no justification for the Court to make the modification urged by petitioner to the totality-of-the-circumstances test for deciding the reliability of an identification, and thereby to overrule *Biggers* and *Brathwaite* in part.

Contrary to petitioner's assertion, the witness's level of certainty has not been "conclusively shown" to have "little or no correlation with the accuracy of th[e] identification" (Pet. 3), and there is no "scientific consensus" (Pet. 5)—much less an "overwhelming" one (*ibid.*)—that supports his proposed rule. As the Supreme Court of Connecticut observed only a few months ago, the "scientific studies" on the correlation between a witness's confidence and the accuracy of his identification "are not definitive." *State* v. *Ledbetter*, 881 A.2d 290, 313 (2005). Accordingly, as the Supreme Judicial Court of Massachusetts observed only a few weeks ago, "there does not appear to be a consensus within the psychological community that 'no' relationship exists." *Commonwealth* v. *Cruz*, 839 N.E.2d 324, 331 (2005). Indeed, a number of studies, including some of the more recent ones on which petitioner relies, "show[] a positive correlation" between confidence and accuracy. *Ledbetter*, 881 A.2d at 313.[*]

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[*] See, *e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 283 (2003) ("Although any given experiment might show a statistically nonsignificant relation between certainty and accuracy, meta-analyses of the literature show a reliable correlation."); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 622 (1998) ("the most exhaustive review to date" suggests that "witnesses who are highly confident in their

Those findings do not support petitioner's basic assertion that witness certainty is "not relevant" (Pet. 10) to the reliability of identification evidence. Cf. Fed. R. Evid. 401 ("relevant" evidence is evidence having any tendency to make the existence of a material fact "more probable" than it would be without the evidence).

Petitioner acknowledges that "some studies have found a statistically significant correlation between witness certainty and accuracy," but contends that "these studies have found such a relationship only by controlling factors that it is impossible or wholly infeasible to control in the real world." Pet. 6. That is not correct. The studies suggest only that "the correlation may be stronger for witnesses who identify a subject during the identification procedure than for those who determine that the perpetrator is not present." *Ledbetter*, 881 A.2d at 313. See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 283 (2003). And because it is only when a witness identifies a subject that the issue in this case will arise, the confidence-accuracy correlation for "witnesses who made a positive identification" is the "appropriate index." Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. 315, 316 (1995).

According to petitioner, "research has shown that the certainty of a witness is easily manipulated by a variety

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identifications are somewhat more likely to be correct as compared to witnesses who display little confidence"). See also Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 Pace L. Rev. 815, 852-853 (1994) ("[a] few studies show that confidence level is a valid predictor of identification accuracy").

of factors that have nothing to do with accuracy," such as "confirming feedback" from law enforcement officers. Pet. 7. Even if true, that is not a reason to adopt petitioner's categorical rule. If, in a particular case, a witness's confidence in the identification has in fact been "manipulated," it might be appropriate for the district court to give the level of certainty little or no weight under the totality of the circumstances. But there is no claim in this case that Lopez's confidence in his identification was "manipulated." Indeed, Special Agent Matta's testimony at the *Wade* hearing confirms that it was not. See 1/27/03 Tr. 28 ("Q. * * * [D]id you do anything to verify, confirm, dissuade him, congratulate him on his selection? A. No, I [did] not."); *id.* at 108 ("Q. * * * [Y]ou didn't encourage him, reward him, do anything to confirm his choice, you wanted it to be an act of his own free will; fair enough? A. Yes.").

Petitioner also relies on research showing that jurors place "disproportionate weight on the confidence of the witness" in deciding whether the identification of the witness was accurate—and, at least when identification is a central issue in the case, in deciding the ultimate question whether the defendant is guilty. Pet. 8. It is not clear that that is correct. As one of the articles on which petitioner relies reports, "survey data indicate that people believe all five criteria are important determinants of identification accuracy," and "certainty is actually ranked as *less* important than each of the four other criteria." Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 Law & Hum. Behav. 581, 591 (2000). In any event, petitioner does not contend that *trial courts* routinely place disproportionate weight on the witness's confidence in making

the threshold determination of whether identification evidence should be *admitted*, and there is no reason to believe that they do. Certainly the district court in this case did not. On the contrary, it appears that the court placed the heaviest weight on Lopez's "significant opportunity to view" petitioner. Pet. App. 16a, 19a.

Even if petitioner could demonstrate the merit of his proposed rule were the issue being considered as a matter of first impression, such a showing would be insufficient here. As petitioner concedes (Pet. 18-20), adoption of the rule he advocates would require the Court to overrule *Biggers* and *Brathwaite* in part, and even in constitutional cases, the doctrine of *stare decisis* "carries such persuasive force" that this Court has "always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). Accord, *e.g.*, *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (opinion of Kennedy, J.); *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996). Because the "psychological research" on which petitioner relies (Pet. 19) does not unequivocally support his proposed rule, he falls far short of demonstrating the requisite "special justification" for overruling in part two of this Court's precedents.

2. Nor is certiorari warranted on the ground that there is a division of authority in the lower courts, for there is none. While they are of course bound by this Court's interpretation of the federal Constitution, lower courts occasionally issue decisions holding that the empirical basis for a constitutional rule adopted by this Court has been shown to be incorrect. See, *e.g.*, *Roper* v. *Simmons*, 125 S. Ct. 1183, 1189 (2005) (lower court held that, since this Court's decision in *Stanford* v. *Ken-*

tucky, 492 U.S. 361 (1989), holding that Constitution does not bar capital punishment for juvenile offenders, "a national consensus ha[d] developed" against that practice) (quoting *State ex rel. Simmons* v. *Roper*, 112 S.W.3d 397, 399 (Mo. 2003) (en banc), aff'd, 543 U.S. 551 (2005)). Petitioner cites no decision in which any court has held that, in light of the current state of scientific knowledge (or for any other reason), the Due Process Clause of the Fifth or Fourteenth Amendment prohibits a trial court from considering the witness's level of certainty in deciding whether an out-of-court identification is independently reliable, such that the out-of-court identification may be admitted (or an in-court identification may be made by the witness). Of the several state-court decisions cited by petitioner (Pet. 12-16), only one, *Ramirez*, 817 P.2d 774 (Utah 1991), adopted the rule that petitioner advocates, and that decision rested on state law, see *id.* at 780-781. The other decisions either addressed the issue of instructions to the jury on identification evidence, see *Ledbetter*, 881 A.2d at 316-319; *Brodes* v. *State*, 614 S.E.2d 766, 767-771 (Ga. 2005); *Commonwealth* v. *Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997); *State* v. *Long*, 721 P.2d 483, 487-495 (Utah 1986), or adopted, as a matter of state law, a rule of admissibility that differs from the one that this Court adopted in *Biggers* and reaffirmed in *Brathwaite*, see *State* v. *Dubose*, 699 N.W.2d 582 (Wis. 2005) (suggestive show-up identification requires exclusion unless procedure was necessary); *Commonwealth* v. *Johnson*, 650 N.E.2d 1257 (Mass. 1995) (suggestive show-up identification always requires exclusion).

3. Review should also be denied because petitioner's claim was not adequately presented to, and was not passed upon by, the court of appeals. "Where issues are

neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Accord, *e.g.*, *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1781 n.14 (2005); *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001). There is no basis for an exception to that rule here.

In his opening brief in the court of appeals, petitioner conceded that the district court had "properly considered the five 'reliability' factors set out by the Supreme Court in *Neil* [v. *Biggers*] and *Manson* [v. *Brathwaite*]," including "the level of certainty expressed by the witness." Pet. C.A. Br. 43-44. His claim was that the district court's "ultimate conclusion of reliability was based on a *misapplication* of these factors." *Id.* at 44 (emphasis added). In asserting that claim, petitioner "d[id] not challenge the district court's finding that, with respect to the fourth *Neil* factor, the certainty of the identification, Lopez expressed no uncertainty when he identified the photo of [petitioner]." *Id.* at 47. Nor did he claim that the district court should not have considered that factor. He merely stated that "the continuing viability of th[e] factor has been called into serious question by the numerous reported DNA exonerations of people who had been convicted, many of capital felonies, based on eyewitness identifications by people who were quite certain, but were nevertheless wrong." *Ibid.*

It was not until he filed his reply brief that petitioner squarely raised the claim that he raises here: that "the five-factor test" described in *Biggers* and *Brathwaite* "for determining reliability and admissibility of suggestive out-of-court identifications" should be "modified in light of currently-available scientific research demon-

strating that there is virtually no correlation between the *certainty* expressed by a witness and the accuracy of the [sic] his/her identification." Pet. C.A. Reply Br. 12. Perhaps because the Second Circuit ordinarily does "not consider an argument raised for the first time in a reply brief," *Evangelista* v. *Ashcroft*, 359 F.3d 145, 156 n.4 (2d Cir. 2004) (quoting *United States* v. *Yousef*, 327 F.3d 56, 115 (2d Cir.), cert. denied, 540 U.S. 933 and 993 (2003)), cert. denied, 125 S. Ct. 1293 (2005), the court of appeals did not consider that claim. Instead, the court addressed only the fact-bound claim that petitioner raised in his opening brief. It explained that the district court had "reasonably determined that though the procedures used in obtaining the identification of [petitioner] were suggestive, the identification by one of his co-conspirators was itself reliable," and held that the district court had therefore not committed "clear error" in applying "the five-part reliability test." Pet. App. 10a.

4. This case is also an unsuitable vehicle for deciding the question presented because adoption of the rule petitioner advocates would have no effect on the outcome. To begin with, there is little doubt that the identification evidence would have been admitted even if the district court had not considered Lopez's level of confidence. Of the other four factors identified in *Biggers* and *Brathwaite*, the district court determined that three weighed in favor of admission. The court found that Lopez's "repeated opportunities to view [petitioner] are strong evidence of independent reliability" (Pet. App. 16a); that Lopez's "degree of attention adds somewhat to the reliability of his identification" (*id.* at 17a); and that "[t]he accuracy of Lopez's description of [petitioner] weighs slightly in favor of a conclusion of independent reliability" (*id.* at 18a). Only the "time lapse

between Lopez's observing [petitioner] and Lopez's selecting his photo from the photo array" was found by the district court to "weigh[] against a finding of independent reliability." *Id.* at 19a. The factor on which the district court appears to have placed the greatest weight in finding the identification reliable, moreover, was not Lopez's level of certainty but his "significant opportunity to view [petitioner]," *id.* at 16a, 19a, based on Lopez's having spent "time with [petitioner] on two consecutive days," *id.* at 16a. There was good reason for the district court to place substantial weight on that factor, because Lopez was not an "eyewitness" in the ordinary sense, but rather was petitioner's co-conspirator.

Even if the evidence would not have been admitted had the district court not considered Lopez's confidence in his identification, there is little doubt that the jury would have reached the same verdict, because there was substantial independent evidence of petitioner's guilt. Both Berrios and Feliciano, who recruited the killers and had known petitioner for some time, testified that petitioner was involved in the murder. Gov't C.A. Br. 61. In addition, Alvarez testified that it was petitioner who had called her apartment in an effort to lure Casiano to the garage before he was killed, and that Casiano had left her a voice-mail message saying that he was going to the garage because petitioner had paged him. *Id.* at 61-62. Indeed, petitioner admitted that he had spoken with Casiano at the garage shortly before the murder. *Id.* at 16, 62. Petitioner also told his girlfriend that he would be going to jail, or would be killed, because of what had happened to Casiano. *Id.* at 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JOSE ANTONIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The Innocence Network ("Network") is an association of thirty member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners whose actual innocence may be established by post-conviction evidence.[1] The Network currently represents hundreds of prisoners with innocence claims in all fifty States and the District of Columbia. The Network also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

The vast majority of individuals exonerated by DNA testing were originally convicted based on eyewitness misidentifications. The Network, therefore, has a compelling interest in ensuring that the legal standard governing admissibility of eyewitness identifications is revised to reflect established limitations on eyewitness testimony.

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[*] *Amicus* certifies that this brief was written by undersigned counsel and that no counsel for a party authored any portion or made any monetary contribution to its preparation or submission. Letters reflecting the written consent of the parties to the filing of this brief have been lodged with the Clerk of the Court.

[1] The Network's U.S. member organizations include: Arizona Justice Project; California/Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Florida Innocence Initiative; Georgia Innocence Project; Idaho Innocence Project; Innocence Institute at Point Park University; The Innocence Project, Inc.; Innocence Project Indiana; Innocence Project Midwest; Innocence Project of Minnesota; Innocence Project Northwest; Iowa/Nebraska Innocence Project; Innocence Project New Orleans; Medill Innocence Project; Mid Atlantic Innocence Project; New England Innocence Project; North Carolina Center on Actual Innocence; Northern Arizona Justice Project; Northern California Innocence Project; Ohio Innocence Project; Pace Post-Conviction Project; Rocky Mountain Innocence Project; Second Look Program; Texas Innocence Network; Texas Center for Actual Innocence; and Wisconsin Innocence Project.

SUMMARY OF ARGUMENT

This Court has long acknowledged the infirmities of eyewitness testimony. *See United States v. Wade*, 388 U.S. 218, 228 (1967) (the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"). In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court held that an eyewitness identification made pursuant to an unnecessarily suggestive identification procedure could nonetheless be admissible on the basis of its independent reliability. *Id.* at 199-200. In so doing, the Court fashioned a five-factor "totality of the circumstances" test for determining eyewitness reliability that evaluates (1) the witness's opportunity to view the criminal at the time of the crime; (2) his or her degree of attention; (3) the accuracy of the prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the length of time between the crime and the identification. *Id.* Notably, however, the *Biggers* factors, which this Court confirmed in *Manson v. Brathwaite*, 432 U.S. 98 (1977), were never grounded upon any available scientific evidence, but rather appear to be based on commonly held assumptions regarding eyewitness testimony.

Since *Biggers*, a substantial body of empirical research has seriously undermined the test's continued validity, particularly the factor weighing a witness's level of certainty, which is paradoxically the least reliable factor and yet the one accorded most weight by juries. Indeed, researchers and commentators have widely condemned various *Biggers* factors as unreliable predictors of eyewitness identification accuracy. In view of this compelling scientific data, the Court should now revise the *Biggers* test to enable courts to effectively distinguish between accurate and inaccurate eyewitness identifications. Accordingly, the Innocence Network, as *amicus curiae*, respectfully requests that the Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit in this case.

I. The *Biggers* Test Fails to Detect Unreliable Eyewitness Evidence and Does Not Effectively Protect Due Process

A. The *Biggers* Factors Were Originally Based on Assumptions About Eyewitness Accuracy Drawn from the Common Law, Rather Than Empirical Data or Scientific Principles

The Court's jurisprudence leading up to *Biggers* and *Brathwaite* stemmed from well-founded due process concerns that eyewitness identifications are unreliable, and that suggestively obtained identifications were a "major factor contributing to the high incidence of miscarriage of justice." *Wade*, 388 U.S. at 228. Prior to *Biggers*, the Court grappled with due process questions arising from eyewitness identifications obtained from various types of suggestive identification procedures. *See, e.g.*, *Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. United States*, 390 U.S. 377 (1968); *Foster v. California*, 394 U.S. 440 (1969); *Coleman v. Alabama*, 399 U.S. 1 (1970). *Biggers* sought to harmonize the Court's decisions regarding suggestive identification procedures by holding that "[i]t is the likelihood of misidentification which violates a defendant's right to due process." 409 U.S. at 198. The "central question" was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199. The Court's subsequent decision in *Brathwaite*, likewise held that "reliability is the linchpin in determining the admissibility of identification testimony" and that "[t]he factors to be considered are set out in *Biggers*." 432 U.S. at 114.

Remarkably, in articulating the Court's test, neither *Biggers* nor *Brathwaite* relied on any existing empirical evidence regarding the unreliability of eyewitness testimony. *See id.* at 125-26 ("Neither *Biggers* nor the Court's opinion today points to any cor[illegible] empirical evidence. Studies since *Wade* have onl[illegible]einforced the validity of its assessment of the dan[illegible]s of identification testimony.")

(Marshall, J., dissenting). Rather, the *Biggers* Court intimated that "the factors to be considered in evaluating the likelihood of misidentification" were drawn from the common law, "as indicated by [the Court's] cases." 409 U.S. at 199. Without citing any specific legal precedents or scientific basis, the *Biggers* Court simply announced five external indicia that it perceived to be analytically effective in measuring the reliability of eyewitness testimony.[2]

Indeed, a witness's level of certainty was considered a questionable indicator of accuracy even prior to *Biggers*. *See, e.g.*, *Clemons v. United States*, 408 F.2d 1230, 1242 (D.C. Cir. 1968) ("although the positiveness of the witness . . . is a relevant factor, it is to be weighed warily and in the realization that the most assertive witness is not invariably the most reliable one"). As Justice Marshall pointed out, "the witness' degree of certainty in making the identification [] is worthless as an indicator that he is correct." *See Brathwaite*, 432 U.S. at 130 (Marshall, J., dissenting) (citing PATRICK WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 15-16 (1965); *People v. Anderson*, 205 N.W.2d 461, 493-494 (Mich. 1973); Frank O'Connor, *"That's the Man": A Sobering Study of Eyewitness Identification and the Polygraph*, 49 ST. JOHN'S L. REV. 1, 4-6 (1974)).

Although other *Biggers* factors had some antecedents in the Court's earlier opinions or the common law, eyewitness certainty had virtually no role as a meaningful indicator of reliability in the Court's jurisprudence prior to *Biggers*.[3]

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[2] Indeed, because this Court cited no scientific evidence supporting its assumption that these factors effectively predict eyewitness accuracy, researchers have noted that this Court merely "offered an intuitive theory of eyewitness identification or at least a set of five hypotheses." Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347, 348 (1983) [hereinafter *What Can Psychology Say*].

[3] Before *Biggers*, the fact that eyewitnesses expressed a high level of certainty had no independent effect on the Court's due process analysis. *See, e.g.*, *Simmons*, 390 U.S. at 385; *Foster*, 394 U.S. at 441-42.

Rather, the Court appears to have adopted the certainty factor based solely on its intuitive (albeit unfounded) appeal, rather than on any scientific principle or empirical fact. *See State v. Long*, 721 P.2d 483, 491 (Utah 1986) (the *Biggers* test was "based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies."); *accord Brodes v. State*, 614 S.E.2d 766, 770 (Ga. 2005). The Court should now resolve the long-standing disconnect between law and science and establish an empirically sound approach to the reliability of eyewitness identifications.

B. Courts and Legal Scholars Have Condemned *Biggers* as an Unsound Analysis of Eyewitness Accuracy and Have Accordingly Sought to Develop Judicial Remedies to Safeguard Due Process

For twenty years, courts have considered academic and scientific literature in questioning the continued soundness of the *Biggers* reliability analysis.[4] Legal commentators have also extensively reviewed empirical research and scientific

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[4] *See, e.g., State v. Ledbetter*, 881 A.2d 290, 312 (Conn. 2005) ("it is appropriate for this court to survey relevant scientific data as that data has been reported in the decisions of other courts and in the scientific literature"); *Brodes v. State*, 614 S.E.2d 766, 770 (Ga. 2005) ("The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.") (internal quotation marks and citation omitted); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995) ("[S]tudies conducted by psychologists and legal researchers since *Brathwaite* have confirmed that eyewitness testimony is often hopelessly unreliable."); *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991) ("[W]e do not agree entirely with the *Biggers* listing of the relevant criteria for determining the reliability of eyewitness identifications and . . . we find some of those criteria to be scientifically unsound."); *State v. Long*, 721 P.2d 483, 488 (Utah 1986) (concluding that "[t]he literature is replete with empirical studies documenting the unreliability of eyewitness identification."); *State v. Dubose*, 699 N.W.2d 582, 592 (Wisc. 2005) ("In light of [empirical] evidence, we recognize that our current approach to eyewitness identification has significant flaws.").

data demonstrating that the *Biggers* test—and particularly the certainty factor—is not a valid predictor of the reliability of eyewitness testimony.[5] Notably, very little scientific data supports the *Biggers* test as a dependable metric for evaluating eyewitness testimony. Courts and practitioners should therefore not be bound by the unsupported assumptions embodied in the *Biggers* factors.

1. Based on Existing Empirical Data, State Courts Have Sought to Eliminate the Certainty Factor from the Analysis

Several state courts of last resort have expressly relied upon empirical research to remedy due process concerns stemming from defects in the *Biggers* test. *See, e.g.*, *Dubose*, 699 N.W.2d at 596 ("Based on our reading of [the due process] clause . . . the approach outlined in *Biggers* and *Brathwaite* does not satisfy this requirement."); *Johnson*, 650 N.E.2d at 1261 ("[W]e conclude that we cannot accept *Brathwaite* as satisfying the requirements of [due process under the Massachusetts constitution].").

State courts have pointedly criticized the certainty factor. In finding the *Biggers* analysis "scientifically unsupported" and fashioning a "more empirically based approach," the Utah Supreme Court rejected the certainty factor as an indicator of an identification's reliability. *Ramirez*, 817 P.2d at 780-81; *see also Long*, 721 P.2d at 490 ("Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid

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[5] *See, e.g.*, Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 250 (2000); Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 844 (1994); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 276 (1991); Randolph N. Jonakait, *Reliable Identification: Could the Supreme Court Tell in* Manson v. Brathwaite*?*, 52 U. COLO. L. REV. 511 (1981).

indicator of the accuracy of the recollection."). Citing the "uncontradicted" scientific literature, the Connecticut Supreme Court found that "the fourth *Biggers* factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification." *Ledbetter*, 881 A.2d at 311. And the Supreme Judicial Court of Massachusetts expressed "significant doubt about whether there is any correlation between a witness's confidence in her identification and the accuracy of her recollection[,]" and held that trial courts should not instruct a jury to "take into account . . . the strength of the identification." *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997).

Most recently, the Georgia Supreme Court recognized that "'[a]n important body of psychological research undermines the lay intuition that confident memories of salient experiences . . . are accurate.'" *Brodes*, 614 S.E.2d at 770 (quoting *Kirk v. Eli Lilly & Co.*, 897 F.2d 293, 296 (7th Cir. 1990)). The court held that it could "no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification[,]" and instructed Georgia trial courts to "refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in deciding the reliability of that identification." *Brodes*, 614 S.E.2d at 771. The court found this approach necessary "[i]n light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification[.]" *Id.*[6]

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[6] This Court too has previously relied upon sociological and scientific research in evaluating constitutional challenges, including those relating to the inherently suspect qualities of eyewitness identification evidence. *See, e.g.*, *Wade*, 388 U.S. at 228 n.6; *Watkins v. Sowders*, 449 U.S. 341, 350 n.1 (1981) (Brennan, J., dissenting, with Marshall, J.) ("The special

2. Courts Have Also Used Cautionary Instructions in an Effort to Mitigate the Risk of Mistaken Eyewitness Testimony Admitted Under *Biggers*

Moreover, some state courts have recognized that even the most well-intentioned juries may fail to accurately evaluate eyewitness identification evidence once it has been deemed admissible under *Biggers*. "Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness." *Ramirez*, 817 P.2d at 779-80 (quoting *Long*, 721 P.2d at 490 (citations omitted)). *See also Jones v. State*, 749 N.E.2d 575, 586 (Ind. Ct. App. 2001) ("[W]e are not thoroughly convinced that the average juror is conversant with the likelihood or frequency with which misidentifications are made by seemingly unequivocal witnesses.") (internal quotation marks omitted).

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nature of eyewitness identification evidence has produced an enormous reservoir of scholarly writings, many based on solid empirical research."). *See also Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 1195-96 (2005) (considering research on adolescent behavior in concluding it was unconstitutional to impose capital punishment for crimes committed while the defendant was a minor); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (relying on "expert studies and reports . . . show[ing] that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society" in concluding that a race-conscious law school admission policy passed constitutional muster) (internal quotation marks and citations omitted); *id.* at 364-65 (Rehnquist, C.J., dissenting, with Scalia, Kennedy, Thomas, J.J.) (relying on social science evidence to support a contrary conclusion); *Atkins v. Virginia*, 536 U.S. 304, 318 nn.23-24 (2002) (relying on sociological and scientific evidence in concluding that execution of the mentally retarded constituted "cruel and unusual punishment" in violation of the Eighth Amendment); *Davis v. United States*, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring) (relying on social science to explain behavioral tendencies exhibited by suspects during a police interrogation).

In *Long*, the Utah Supreme Court declared that trial courts must give cautionary jury instructions "whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." 721 P.2d at 492. Given the unperceived flaws of eyewitness testimony and the substantial weight given to it by juries, to convict a defendant on eyewitness identification "without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law." *Id.*

And although the Connecticut Supreme Court ruled that it was bound to apply *Biggers*, it held that "some action is necessary to mitigate the risks of [suggestive identification] procedures." *Ledbetter*, 881 A.2d at 316. The court declared that "unless there is no significant risk of misidentification," Connecticut's trial courts must "incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification" in cases involving a suggestive identification procedure. *Ledbetter*, 881 A.2d at 318.

C. The *Biggers* Factors Do Not Reliably Predict the Accuracy of Eyewitness Identifications

A legion of empirical studies analyzing the *Biggers* factors have concluded not only that certain of these factors may have an inconclusive impact on the overall reliability analysis, but also that these factors may actually be misleading in certain circumstances.[7] The vast majority of

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[7] *See, e.g.*, Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 LAW & HUM. BEHAV. 581 (2000); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 374-75 (1998) [hereinafter *Good, You Identified the Suspect*]; Gary L. Wells and Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 785 (1995); Wells & Murray, *What Can Psychology Say*, *supra*, at 347. *See generally* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995) [hereinafter *Mistaken Identification*].

studies have confirmed that little or no correlation exists between a witness's certainty and the accuracy of the identification. This conclusion is especially alarming given that the factor upon which juries place the greatest weight is witness certainty. Cutler & Penrod, *Mistaken Identification*, *supra*, at 181-209. Researchers have also characterized three of the four remaining *Biggers* factors as subjective "self-report" variables measured by the witness, which, contrary to beliefs commonly held by laypersons, do not accurately reflect the actual circumstances at the time of the crime. *See* Judges, *supra*, at 265; Rosenberg, *supra*, at 276-79. As illustrated below, proven limitations on human perception can undermine the utility of an eyewitness's report of the very information upon which the *Biggers* framework relies, severely compromising the effectiveness of the *Biggers* test.

1. Witness's Level of Certainty

Scientific research has undermined the commonly held misconception that the level of certainty (or "confidence") a witness demonstrates in making an identification is a reliable predictor of accuracy. This assumption is wrong; confidence is not an independent indicator of accuracy. *See, e.g.*, Cutler & Penrod, *Mistaken Identification*, *supra*, at 94-96; Bradfield & Wells, *supra*, at 590-92; C. A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence*, *in* ADULT EYEWITNESS TESTIMONY 348, 348-61 (David Frank Ross et al. eds. 1994); Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243, 258 (1980) ("The judicial system should cease and desist from a reliance on eyewitness confidence as an index of eyewitness accuracy.").

At most, only a weak correlation exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification. *See, e.g.*, Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 622-23 (1998) [hereinafter *Eyewitness*

Identification Procedures]; Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 236 (1987) ("experiments testing the eyewitness-confidence accuracy relation indicate that the correlation is negligible"). The primary problem with the certainty factor is that witnesses may exhibit confidence entirely independent of the accuracy of their judgments. "The confidence-accuracy relationship is generally found to be small or absent, but witnesses are confident in whatever choice they make." Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 488 (1981).

Not only is the certainty factor the least reliable *Biggers* factor, but it is also the one most likely to taint the jury's deliberations.[8] *See, e.g.*, Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL. & L. 817, 830 (1995) ("Jurors are not adequately sensitive to aspects of witnessing and identification conditions that are arguably better predictors of witness accuracy than is witness confidence"); Luus & Wells, *Eyewitness Identification Confidence*, *supra*, at 348 ("jurors tend to rely heavily on eyewitness confidence to infer witness accuracy"); R. C. L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 80-82 (1981) (finding that eyewitness confidence accounted for as much as 50 percent of the variability in mock juror belief in eyewitness testimony).

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[8] The Members of this Court have recognized that "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries." *Watkins*, 449 U.S. at 352 (Brennan, J., dissenting, with Marshall, J.); *see also Brathwaite*, 432 U.S. at 120 (Marshall, J., dissenting) (a "fundamental fact of judicial experience" ignored by the Court is that "juries unfortunately are often unduly receptive to [identification] evidence").

Eyewitness identification evidence will be particularly persuasive to jurors when the witness exhibits confidence in the identification, whether correct or incorrect. *See, e.g.*, Bradfield & Wells, *supra*, at 582 ("researchers have found that certainty of an eyewitness has a strong impact on participant-jurors' perceptions of the accuracy of the identification" (citing studies)); Cutler & Penrod, *Mistaken Identification*, *supra*, at 181-196 (surveys show that people believe a strong relation exists between eyewitness confidence and accuracy). In one study, mock jurors relied heavily on witness confidence but were unable to differentiate between accurate and inaccurate testimony, believing both approximately 80% of the time, "irrespective of the actual rate of witness accuracy." Gary L. Wells et al., *Accuracy, Confidence, and Juror Perception in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 447 (1979).

By the time a jury assesses a witness's confidence, the level of confidence may be inflated by numerous externalities, such as repeated questioning and coaching stemming from witness preparation. *See* Penrod & Cutler, *Witness Confidence and Witness Accuracy*, *supra*, at 830 ("witness confidence . . . appears to be highly malleable and influenced by postidentification factors such as repeated questioning, briefings in anticipation of cross-examination, and feedback about the behavior of other witnesses."). Based on this inflated confidence, jurors may tend to give eyewitness testimony disproportionate weight in voting to convict a defendant even in the face of evidence discrediting the eyewitness.

2. Witness's Opportunity to View the Criminal at the Time of the Crime

Courts are required under *Biggers* to consider the witness's opportunity to view the criminal during the crime. But the information upon which courts must rely is merely the witness's own approximation of his or her distance from the criminal, the extent to which the criminal's face was

blocked, or most commonly, the amount of time the witness had to view the assailant.

Witnesses are often unable to accurately estimate such information. Most significantly, a witness's ability to approximate the time he or she had to observe the criminal is, poor at best. Witnesses almost invariably overstate temporal duration. Jonakait, *supra*, at 518. Whereas a witness's estimate of distance, speed, height or weight may err in either direction, humans always tend to perceive an event as lasting longer than it actually did. *Id.* The tendency to overstate is even stronger when the witness is experiencing stressful circumstances. Rosenberg, *supra*, at 278-79. The *Biggers* test therefore requires courts to rely on information that has effectively been tainted by the limits of human perception.

3. Witness's Degree of Attention

Consideration of the witness's degree of attention also requires reliance on the witness's own approximation of his or her own attentiveness. That alone is problematic, but this factor's relevancy is further cast into doubt by scientific studies that have debunked the commonly held myth that a witness is more attentive to details in a dangerous situation and thus better able to accurately identify the assailant. Rosenberg, *supra*, at 278. The presence of a weapon can further undermine a witness's ability to observe identifying characteristics of an assailant; this weakened capacity is referred to as the "weapon focus" phenomenon, whereby the presence of a knife or a gun, for example, narrows a witness-victim's concentration. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 35 (1996 ed.). Rather than focus on the assailant's face or other distinguishing features (*e.g.*, tattoos), the witness will concentrate more intently on the weapon, rendering that witness's ability to identify the assailant less reliable. *Id.* Thus, a witness's estimation of his or her attentiveness to the assailant is unlikely to aid in the analysis of whether an identification is independently reliable.

4. Accuracy of the Prior Description

The "accuracy of the witness's prior description" factor has also been questioned on the basis that it is irrelevant to the accuracy of the identification itself. Scientific evidence indicates that there is no "appreciable relationship between a person's prior description of a face and the person's accuracy in identifying the face." Wells & Murray, *What Can Psychology Say, supra*, at 355 (citing studies); *see also* Alvin G. Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?*, 13 BULL. PSYCHONOMIC SOC'Y 15, 15-18 (1979). Moreover, a witness's verbal ability to describe an individual's face does not correlate to the witness's ability to accurately identify that person. *See* A. Daniel Yarmey, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 138-39 (1979). Thus, even a description provided before an identification that closely parallels a defendant's features does not necessarily render the identification reliable. Finally, even if the initial description and the defendant's characteristics are identical, witnesses may be led to erroneously recall certain characteristics during the initial description. *See* Wells & Murray, *What Can Psychology Say, supra*, at 355. Under such circumstances, this *Biggers* factor is undeniably satisfied, but both the prior description and the subsequent identification would be inaccurate.

D. The *Biggers* Test Is Not Immune from the Taint of Suggestive Identification Procedures

As demonstrated above, the *Biggers* factors are ineffective predictors of accuracy, even without the taint of an unnecessarily suggestive identification procedure. The *Biggers* test was fashioned to determine whether a tainted identification could be rehabilitated on the basis that it is independently reliable. The *Biggers* factors, however, are not immune from the tainting effects of a suggestive procedure. Social scientists have proven that these factors—especially witness certainty—are vulnerable to such contamination; thus, the *Biggers* analysis is not sufficiently

independent of the threshold issue of suggestiveness. *See, e.g.*, Wells, *Eyewitness Identification Procedures*, *supra*, at 631; Judges, *supra*, at 264-70. *See also Cossel v. Miller*, 229 F.3d 649, 655 n.4 (7th Cir. 2000) ("The fourth *Biggers* factor—the level of certainty demonstrated by the witness at the time of the identification—has little relevance here, where the level of certainty a witness demonstrates is just as likely to be a product of a prior unduly suggestive identification as it is to be a product of an independent recollection of the crime.").

Unlike physical evidence, which is subject to stringent scientific methods of collection, documentation, and preservation, memory evidence is handled in a manner based merely on intuition and tradition. *See* Judges, *supra*, at 240-41. Indeed, the so-called "system" variables within the investigator's control during collection of eyewitness evidence (*e.g.*, line-up and show-up methods, questions asked, and comments made during interviews and identification processes) remain largely unregulated and can have a dramatic impact on eyewitness accuracy when suggestive. *See id.* at 243-45. Because suggestiveness is likely to infect a witness's memory and increase a witness's level of certainty—especially when the suggestiveness originates with highly credible sources such as police officers—eyewitness testimony may become contaminated throughout the investigative process, during interviews, lineups, show-ups and post-identification communication. *Id.* at 245-69.

Experiments designed to test the effect of suggestive post-identification feedback illustrate how the *Biggers* test factors cannot be evaluated independently of the suggestiveness that initially compromised the identification. In one such study, eyewitnesses to simulated crimes were asked to identify the "criminal" out of a photo line-up. Following those identifications, certain participants were told: "Good. You identified the actual suspect"; others were given disconfirming or no feedback. Wells & Bradfield, *Good, You Identified the Suspect*, *supra*, at 363. The

researchers concluded that "a casual comment from a lineup administrator following eyewitnesses' identifications can have dramatic effects on their reconstructions of the witnessing and identification experience" and that "a suggestive procedure itself (the feedback) can cause eyewitnesses to come across strongly" on "four of the five *Biggers* criteria (confidence, view, attention, and description of the perpetrator). . . ." *Id.* at 374-75. Most significantly, researchers found that confirming feedback had a "huge effect" on the witness's level of certainty. *Id.* at 374.

A suggestive identification procedure so fundamentally contaminates the factors used to evaluate independent reliability as to render them useless. Indeed, "arguing that a suggestive procedure is not a problem because of the eyewitness's high standing on the *Biggers* criteria is a bit like arguing that a forensic DNA procedure that contaminated the suspect's blood with the sample at the crime scene is not a problem because the lab results show that the match is virtually perfect." *Id.* at 375.

II. The Overwhelming Majority of Wrongful Convictions Have Been Premised on Erroneous Eyewitness Identifications

A. Exoneration Data Studies Confirm that Eyewitness Misidentification Is the Most Prevalent Cause of Wrongful Convictions

Mistaken eyewitness identification is the most common cause of wrongful convictions; indeed, the Innocence Project has concluded that 125 of the first 163 (76.69%) individuals exonerated by DNA evidence had been convicted, at least in part, by eyewitness misidentification. *See* Innocence Project, http://www.innocenceproject.org/causes/mistakenid.php (last visited on January 29, 2006).

A recent study reviewing 340 exonerations between 1989 and 2003 found that 64% involved at least one mistaken identification. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J.

CRIM. L. & CRIMINOLOGY 523, 542 (2005). Another study concluded that approximately 90% of the cases analyzed therein involved one or more mistaken identifications. Wells, *Eyewitness Identification Procedures*, *supra*, at 605-08. Likewise, the U.S. Department of Justice study reviewed twenty-eight DNA exoneration cases and found that, in a majority of the cases, eyewitness identifications had provided compelling (but erroneous) evidence at trial. *See* U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, *Convicted By Juries, Exonerated By Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Pub. No. NCJ 161258, 24 (1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf.

B. The Need for Revision Is Underscored by the Stories of Innocent Individuals Wrongly Convicted under *Biggers*

The infirmities of the *Biggers* framework are exemplified by those innocent men and women who have been or remain unjustly imprisoned because an eyewitness's identification was erroneously deemed "reliable" under *Biggers*. The stories of Carlos Lavernia, Mark Reid, and Steven Toney illustrate the tragic results that can follow an erroneous *Biggers* analysis.[9]

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[9] The three men profiled here are but a small sample of exonerees whose wrongful convictions were based on mistaken eyewitness identifications. Others include: Clark McMillan (*McMillan v. Barksdale*, 823 F.2d 981 (6th Cir. 1987)); Ronnie Bullock (*People v. Bullock*, 507 N.E.2d 44 (Ill. App. Ct. 1987)); Clyde Charles (*State v. Charles*, 511 So. 2d 1164 (La. Ct. App. 1987)); Bernard Webster (*Webster v. State*, 474 A.2d 1305 (Md. Ct. App. 1984)); David Brian Sutherlin (*State v. Sutherlin*, 393 N.W.2d 394 (Minn. Ct. App. 1986)); Jimmy Ray Bromgard (*State v. Bromgard*, 862 P.2d 1140 (Mont. 1993)); Chester Bauer (*State v. Bauer*, 683 P.2d 946 (Mont. 1984)); Lesly Jean (*State v. Jean*, 311 S.E.2d 266 (N.C. 1984)); Terry Chalmers (*People v. Chalmers*, 163 A.D.2d 528 (N.Y. App. Div. 1990)); Leonard Callace (*People v. Callace*, 143 A.D.2d 1027 (N.Y. App. Div. 1988)); Wahir Abdal Abdal, a.k.a. Vincent Jenkins (*People v. Jenkins*, 132 A.D.2d 942 (N.Y. App.

1. Carlos Lavernia, Served Fifteen Years

In 1985, Carlos Lavernia was convicted of aggravated rape, principally on the basis of the victim's eyewitness testimony. *Lavernia v. Lynaugh*, 845 F.2d 493, 495 (5th Cir. 1988). Unable to make a positive identification during two photographic lineups, the victim subsequently identified Lavernia as her assailant in a third photo lineup, fourteen months after the crime. *Id.* The Fifth Circuit affirmed the denial of Lavernia's *habeas corpus* petition, determining that the identification was reliable under *Biggers*. *Id.* at 500. The court found that even though such a significant period of time had passed between the crime and the identification, "the victim could hardly have expressed more certainty with regard to her identification[,]" she had "ample opportunity to view Lavernia[,] [and] . . . the description she gave the police of the assailant accurately fit Lavernia." *Id.* at 500. Lavernia was sentenced to ninety-nine years in prison, fifteen of which he served until he was successfully exonerated by DNA evidence. *See* Innocence Project Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=79 (last visited on January 29, 2006).

2. Mark Reid, Served Six Years

Following a jury trial, Mark Reid was convicted of sexual assault and kidnapping in the first degree, based in part on the victim's identification of him as the assailant. *State v. Reid*, 757 A.2d 482, 484, 489-91 (Conn. 2000). The victim described her attacker to police on the night of the attack as a stocky, light-skinned black male, about 5'7", with

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Div. 1987)); Brian Piszczek (*State v. Piszczek*, No. CR-257813, 1993 WL 106966 (Ohio Ct. App. April 8, 1993)); Walter D. Smith (*State v. Smith*, No. 87AP-85, 1988 WL 79080 (Ohio Ct. App. July 28, 1988)); Danny Brown (*State v. Brown*, C.A. No. L-92-297, 1983 WL 6945 (Ohio Ct. App. Sept. 16, 1983)); Thomas Webb (*Webb v. State*, 746 P.2d 203 (Okla. Crim. App. 1987)); Nicholas Yarris (*Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988)); Glen Woodall (*State v. Woodall*, 385 S.E.2d 253 (W. Va. 1989)). *See also* Innocence Project Case Profiles, *available at* http://www.innocenceproject.org/case/search_profiles.php.

freckles across his nose and under his eyes. *Id.* at 485; Innocence Project Case Profiles, *available at* http://www.innocenceproject.org/case/display_profile.php?id=133 (last visited on January 29, 2006). Nevertheless, while she was shaking and crying, she selected Reid out of a photographic lineup conducted just four days later, despite the fact that Reid is 6′0″ and the photo contained no visible freckles. *See Reid*, 757 A.2d at 485, 492. Because she later testified that she had ample time to view him during the crime and that she had no doubt that Reid was her attacker—indeed, the court reiterated the victim's statement that her attacker's face was "a face I would not forget"—the court determined that the identification was reliable under *Biggers*. 757 A.2d at 492-93. Both the victim and the court were wrong. DNA test results conclusively established Reid's innocence; he was exonerated after serving six years.

3. Steven Toney, Served Thirteen Years

Steven Toney was convicted of rape and sodomy and was sentenced to two consecutive life terms, largely on the basis of eyewitness testimony. *State v. Toney*, 680 S.W.2d 268, 271 (Mo. Ct. App. 1984). Engaging in a *Biggers* analysis, the court concluded that the victim's testimony was reliable because (1) she had a good opportunity to observe the appellant's face at least twice without distraction; (2) "[t]he level of certainty of each of the identifications was high"; and (3) only eight days had passed between the attack and the photo lineup. *Id.* at 276. Despite discrepancies between the victim's original description and Toney's physical characteristics, the court stated that these discrepancies were "unrelated to" the claims of suggestiveness. *Id.* Before he was cleared of all charges by DNA evidence, Toney served over thirteen years in prison. *See* Innocence Project Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=09 (last visited on January 29, 2006).

CONCLUSION

The empirical evidence establishing the fallibility of eyewitness testimony and the *Biggers* test, which was not expressly grounded in scientific research, is essentially unchallenged. The growing number of exonerated criminal defendants wrongfully convicted based on erroneous eyewitness identifications further confirms that the *Biggers* test fails to accomplish its purpose—namely, to ensure that only reliable eyewitness identifications are considered. Accordingly, this Court should now reconsider the *Biggers* test and harmonize it with current scientific knowledge in order to preserve the due process rights of innocent men and women across the Nation.

Several conceivable alternatives exist to remedy the infirmities of *Biggers*, such as: (1) removing the certainty factor, as well as the other factors that have been undermined by sociological and scientific research, from the current analytical framework; (2) suppressing eyewitness identifications obtained from unnecessarily suggestive identification procedures; (3) requiring courts to issue cautionary jury instructions; and/or (4) encouraging expert testimony on eyewitness identification. As the *Biggers* test currently stands, however, courts are bound to follow a flawed analytical framework that is not based upon, and is contrary to, established empirical findings.

For the foregoing reasons, and for the reasons stated in the Petitioner's brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the
Supreme Court of the United States

JOSE ANTONIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Neil v. Biggers, 409 U.S. 188 (1972), requires courts to consider the level of an eyewitness's certainty in determining whether an identification made during an unnecessarily suggestive procedure is nonetheless sufficiently reliable to satisfy the requirements of due process. The question presented is whether this Court should reconsider *Biggers*' eyewitness-certainty factor in light of subsequent empirical evidence demonstrating that witness certainty has no bearing on the accuracy of an identification—empirical evidence that has led many federal courts to question and state courts to reject application of that factor in assessing reliability.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 States. NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the reliability of eyewitness identifications.

NACDL is particularly interested in seeing the correct rule emerge from this case, because of the scientific consensus that witness confidence has little to do with reliability and because misidentifications continue to be the leading cause of wrongful convictions.[1]

STATEMENT OF THE CASE

Over thirty years ago this Court recognized that the "annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S.

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[1] The parties have consented to the filing of this brief in letters that are on file in the Clerk's office. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

218, 228 (1967) (citing empirical research). Over the ensuing thirty-nine years, little has changed. Indeed, eyewitness misidentification is now the single greatest source of wrongful convictions in the United States. *See* Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 606 (1998).

This problem is not well addressed by the standard crafted by this Court to ensure the reliability of eyewitness identifications—a standard that has itself proven unreliable. In *Neil v. Biggers*, 409 U.S. 188, 199 (1972), this Court held that an eye-witness identification that is the product of an otherwise *unconstitutionally suggestive identification procedure* nonetheless may be admitted if there are certain indicia of reliability. One of the key factors allowing admission, the Court held, is the witness's certainty that his or her identification is accurate.

That factor has failed the test of time. Since *Biggers* was decided, empirical research consistently has shown that the certainty or confidence of a witness bears little, if any, relation to the reliability of an identification. Indeed, the lack of any strong correlation between witness certainty and accuracy is at this point beyond all reasonable dispute. Thus, on a daily basis, courts admit what are otherwise unconstitutionally suggestive identifications based solely on a factor that makes no empirical sense. Worse yet, some trial courts are extending the *Biggers* framework to preclude unquestionably qualified experts from testifying about an admittedly scientific fact: that eyewitness confidence has nothing to do with accuracy. *See e.g., United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999). This Court should grant *certiorari* to reconsider the five-factor totality of the circumstances test devised by *Neil v. Biggers* for three reasons.

First, the fact that lower courts have called into question or outright rejected reliance on witness certainty demonstrates that the time is ripe to revisit *Biggers*. State courts of last resort applying state constitutional provisions are free to reject the witness-certainty factor, and many have done so. Moreover, although federal courts continue to be bound by this Court's holding in *Biggers*—thus precluding a direct circuit split—their express dissatisfaction with the *Biggers* test has led to a number of closely related disagreements. For example, the circuits are hotly divided over whether and to what extent expert testimony to contradict eyewitness confidence is admissible.

Second, the *Biggers'* witness-confidence prong is a prime candidate for review and revision under principles of *stare decisis*. The empirical basis of this aspect of *Biggers* has eroded to the vanishing point; the witness-confidence prong is only superficially workable; reliance interests are not at stake; and, because *Biggers* is a constitutional decision, it is not subject to legislative correction.

Third, the erroneous witness-certainty factor is applied in courts across the country every day and has been shown to result in wrongful convictions. That alone warrants this Court's consideration. Little this Court does is more important than protecting the due process rights of defendants whose liberty and life are at stake and ensuring public confidence in the criminal trial process.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS HAVE CALLED INTO QUESTION THE VALIDITY OF *BIGGERS'* WITNESS-CERTAINTY FACTOR AND DIVIDED OVER ITS APPLICATION.

In the decades since *Biggers* was decided, scientific evidence has demonstrated beyond reasonable dispute

that *Biggers*' witness-certainty factor does not ensure or even correlate with the reliability of eyewitness identifications. As a result, state courts of last resort construing state due process guarantees have increasingly abandoned the *Biggers* framework—particularly the certainty factor—in favor of more sound measures of reliability. Federal courts—bound to apply *Biggers*' five-factor test until this Court says otherwise—have responded by dividing over the application and implications of the *Biggers*' witness-certainty factor. The disagreement expressed by state courts and the division within the federal courts counsel granting the writ.

A. State High Courts Applying Identical State Constitutional Provisions Have Rejected The Witness-Certainty Factor.

In state after state, courts of last resort presented with the issue are discarding *Biggers*' witness-certainty factor in light of the scientific consensus concerning its lack of relevance to accuracy. Recognizing the flaws in the empirical basis on which the witness-certainty factor rests, several state's high courts have rejected *Biggers* in its entirety and outlawed the use of unnecessarily suggestive identifications altogether. In *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995), the Massachusetts Supreme Judicial Court held that the state constitution requires the *per se* exclusion of suggestive identifications, regardless of witness certainty. Likewise, in *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005), the Wisconsin Supreme Court abandoned its previous adherence to *Biggers*, and held that suggestive identification procedures are inherently unreliable and generally inadmissible. *Id.* at 593-94. And in *People v. Adams*, 53 N.Y.2d 241, 251-52 (N.Y. 1981), the New York Court of Appeals adopted a *per se* rule excluding suggestive out-of-court identifications.

Similarly, having first recognized that *Biggers*' witness-confidence factor is "based on assumptions that

are flatly contradicted by well-respected and essentially unchallenged empirical studies," *State v. Long*, 721 P.2d 483, 491 (Utah 1986), the Utah Supreme Court subsequently rejected *Biggers* as insufficient to guarantee due process under the Utah Constitution. Deeming *Biggers* to be "scientifically unsound," that court fashioned a more "empirically based" test of reliability that did not include witness certainty. *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991). In doing so, it specifically rejected witness certainty "as an indicator of an identification's reliability." *Id.* at 781; *see also Long*, 721 P.2d at 490.

Most recently, in *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005), the Georgia Supreme Court specifically rejected *Biggers*' witness-certainty prong, holding that administering a "level of certainty" instruction—informing jurors that they may consider a witness's level of certainty as a factor supporting "the reliability of [an] identification"—was reversible error. That court observed that "[i]n the 32 years since the decision in *Neil v. Biggers*, the idea that a witness's certainty in his or her identification ... reflected the witness's accuracy has been flatly contradicted by well-respected and essentially unchallenged empirical studies." *Id.* at 770 (internal quotations omitted).

Other state courts, while declining to abandon *Biggers*, have recognized its flawed analytical underpinnings and have expressed dissatisfaction with its witness-certainty prong. *See, e.g.*, *State v. Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) ("The uncontradicted scientific literature ... suggests that the fourth *Biggers* factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness ... and the accuracy of that identification."); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. Ct. App. 2001) (recognizing "the growing body of scientific work which has challenged many commonly held beliefs about

eyewitness credibility"); *Rimmer v. State*, 825 So.2d 304, 337 (Fla. 2002) (Pareinte, J., dissenting in part) ("Since *Neil* [*v. Biggers*] was decided, additional social science research, as well as actual cases, have taught us much about the fallibility of eyewitness identification.").

Because this Court cannot review a state court's interpretation of a state constitution, and because the lower federal courts are bound by this Court's precedents, the Court will never be confronted with a decision squarely rejecting *Biggers*. Nonetheless, widespread repudiation of *Biggers* by the states is itself grounds for revisiting a decision that has proven to be fundamentally flawed. The federal courts should not be put in a position in which they are required to adhere to an outmoded judicially-crafted test while the state courts are trumpeting the empirical baselessness of that same test. Rather, *certiorari* is warranted where, as here, subsequent empirical knowledge has undermined the rationale of a decision. *See e.g., Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)); *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling in part *Swain v. Alabama*, 380 U.S. 202 (1965)); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The petition thus appropriately seeks, not error correction, but a correction in controlling law.

B. Although Bound By Precedent, Federal Courts Have Questioned *Biggers* Based On Compelling Scientific Evidence.

Federal appellate and district courts alike have expressed dissatisfaction with the witness-certainty prong of *Biggers*. These federal courts struggle to do justice within the *Biggers* framework, but are ultimately bound to follow this Court's precedent. For example, even though the Seventh Circuit has acknowledged that "[d]eterminations of the reliability suggested by a

witness's certainty after the use of suggestive procedures are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures," it has obligingly adhered to *Biggers* in the criminal law context. *United States ex. rel. Kosik v. Napoli*, 814 F.2d 1151, 1159 (7th Cir. 1987). However, in other contexts, the Seventh Circuit has repudiated the premise underpinning *Biggers*' witness-confidence prong. In *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 296 (7th Cir. 1990), that court observed that "[a]n important body of psychological research undermines the lay intuition that confident memories of salient experiences ... are accurate." It further noted that "certitude is not a reliable test of certainty," and that "the mere fact that we remember something with great confidence is not a powerful warrant for thinking it true [because] accuracy of recollection is *not* highly correlated with the recollector's confidence." *Id.* at 297 (emphasis in original).

The Seventh Circuit's skepticism towards witness certainty and eyewitness recollection is not unique. In *Grayer v. McKee*, 149 Fed. Appx. 435 (6th Cir. 2005), the court of appeals recognized that social science studies "demonstrate that there is *no correlation* between the confidence of the witness and the accuracy of the identification," and expressed "concerns about the reliability of identification" made in that case. *Id.* at 447-48 (emphasis added). Nonetheless, the court adhered to the "established precedent" of *Neil v. Biggers*, finding that even in a "close case," if a witness said he was "certain" of his identification, the "level of certainty" factor supports the reliability of the identification and, thus, admission of it as evidence. *Id.* at 448. In *Abdur-Raheem v. Kelly*, 98 F. Supp. 2d 295, 306-07 (E.D.N.Y. 2000), *rev'd on other grounds*, 257 F.3d 122 (2d Cir. 2001), the court argued that "[b]ased on empirical research into eyewitness identifications" the witness-certainty factor should be given little weight because it "assign[s] too much predictive value to eyewitness confidence and also to

witnesses' descriptions, neither of which is very predictive of identification accuracy in scientific studies."

Other judges have expressed similar concerns over application of *Biggers'* witness-confidence prong, all the while adhering—as they must—to precedent. *See, e.g.*, *United States v. Singleton*, 702 F.2d 1159, 1179 (D.C. Cir. 1983) (Wright, J., dissenting) ("[I]nnumerable authorities have concluded that a witness'[s] degree of certainty in making an identification generally does not measure its reliability. Indeed a *negative* correlation sometimes exists between a witness'[s] confidence and the accuracy of the identification.") (emphasis in original); *Ocasio v. Artuz*, No. 98-CV-7925 (JG), 2002 WL 1159892, *10 n.7 (E.D.N.Y. May 24, 2002) ("[I]n truth, social science has convincingly revealed that there is little or no correlation between an eyewitness'[s] confidence in an identification and the accuracy of the identification.") (citing psychological research); *Smith v. Smith*, No. 02 Civ. 7308 (WHP) (JCF) 2003 WL 22290984, *11-12 (S.D.N.Y. Sept. 29, 2003) ("Studies have indicated that the empirical evidence does not support the idea that eyewitness confidence is a valid measure of eyewitness accuracy under ecologically valid conditions. [One reason for this phenomenon] is the extreme malleability of eyewitness confidence.") (internal citation and quotation marks omitted).

In this case, Petitioner Perez requested that the Second Circuit reject *Biggers'* witness-certainty factor in light of the academic consensus that there is little, if any, correlation between the certainty expressed by a witness and the accuracy of an identification. At oral argument, the Second Circuit agreed that reliability of *Biggers'* witness-certainty factor presented an interesting question and lamented the fact that jurors were typically denied information on how frequently firm identifications turn out to be false. It noted, however, that it was bound by

this Court's precedent and had no authority to overrule *Biggers* or modify its five-factor test.

These cases demonstrate the discontent in the lower federal courts and the pressing need for this Court to step in and revisit its own precedent.

C. Federal Courts Are Divided Over The Integrally Related Issue Of Expert Testimony Concerning Eye-Witness Reliability.

Biggers not only established an unscientific test that federal courts must apply with willful blindness, but has led some courts to exclude expert evidence challenging the reliability of eyewitness identifications. The circuits disagree over whether and in what circumstances *Biggers* permits such expert testimony, with many often excluding such evidence precisely because it challenges reliance on a witness's certainty regarding his identification. Thus, the lower courts are divided over use of *Biggers*' witness-certainty factor to exclude what is empirically sound evidence about eyewitness identifications.

For example, in *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999), the Second Circuit excluded a "plainly qualifie[d] expert" from testifying about admittedly scientifically reliable evidence. Although the district court certified the defendant's expert and recognized the scientific reliability of the proffered testimony, it nonetheless refused to allow testimony on the accuracy of witness confidence because it might confuse or mislead the jury. *See id.* at 288-89. The Second Circuit affirmed. *Id.* Likewise, in *United States v. Smith*, 156 F.3d 1046, 1052-53 (10th Cir. 1998), the district court refused to allow, and the Tenth Circuit refused to require, expert testimony regarding eyewitness identifications. In *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992), the Eleventh Circuit found defendants' argument that the trial court abused its discretion by refusing to admit an expert in eyewitness identification entirely "without merit." Other courts have

reached similar conclusions. *See United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994) (upholding the district court's exclusion of expert eyewitness identification testimony); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (same).

In their effort to apply *Biggers* faithfully, these courts have missed the fundamental concern over the admission of suspect eyewitness identifications. Simply put, jurors routinely *overestimate* the value of eyewitness confidence. As the Third Circuit has observed, the fact that "witnesses ofttimes profess considerable confidence in erroneous identifications is fairly counterintuitive." *United States v. Stevens*, 935 F.2d 1380, 1400 (3d Cir. 1991). Indeed, "perhaps it is precisely because jurors do not appreciate the fallibility of eyewitness testimony that they give such testimony great weight." *Ramirez*, 817 P.2d at 780-81 (internal quotation omitted); *see also Hager v. United States*, 856 A.2d 1143, 1147, 1149 (D.C. 2004) ("[I]t cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.").

Recognizing the need for expert testimony on the relationship between eyewitness confidence and accuracy, at least one court of appeals has permitted such expert evidence. *Stevens*, 935 F.2d at 1400-01 (reversing exclusion of expert testimony on the accuracy of witness confidence). Despite finding that identification evidence admissible under *Biggers* because of witness confidence, *see id.* at 1391, the Third Circuit held that the defendant was entitled to introduce expert evidence challenging the correlation between confidence and accuracy, *see id.* at 1400-01. Other courts have reached similar conclusions, albeit more narrowly. In *United States v. Harris*, 995 F.2d 532 (4th Cir. 1993), the defendant proffered expert testimony to show that post-identification discussions among witnesses could have strengthened the confidence in their identifications. The Fourth Circuit held that in

certain, limited circumstances, expert testimony on eyewitness confidence could be admissible. *See id.* at 535 ("The narrow circumstances held sufficient to support the introduction of expert testimony have varied but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, psychological phenomena as the feedback factor and unconscious transference.").

The unwarranted extension of *Biggers* to exclude admittedly scientific testimony by acknowledged experts is doubly troubling in that it not only permits the admission of questionable identification evidence, but then uses the rationale behind that admission to exclude a defendant's reliable scientific evidence. Ironically, this Court has itself acknowledged that the suggestive identification techniques typically at issue in a *Biggers* analysis may increase witness certainty while inherently diminishing reliability—yet many lower courts have effectively deprived the jury of that knowledge in the name of precedent. *See Manson v. Brathwaite*, 432 U.S. 98, 111-12 (1977) (explaining that suggestive identification techniques are themselves highly influential on a witness); *Simmons v. United States*, 390 U.S. 377, 383-84 (1968) (holding that a witness "is apt to retain in his memory the image of the [misidentified] photograph rather than of the person actually seen"); *see also Napoli*, 814 F.2d at 1159 ("Determinations of the reliability suggested by a witness's certainty ... are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures."); *Dubose*, 699 N.W.2d at 592 ("Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness.").

The fact that the lower federal courts are split on the implications of *Biggers* is further reason for this Court to

grant the writ. Rather than allow the lower courts to continue to divide over the admissibility of the science that contradicts the *Biggers*' witness-certainty factor, this Court should squarely address the empirical evidence and revisit the core issue of reliability in admission of eyewitness identifications.

II. PRINCIPLES OF *STARE DECISIS* SUPPORT RECONSIDERATION OF *BIGGERS*' WITNESS-CERTAINTY PRONG.

This Court's jurisprudence on *stare decisis* weighs strongly in favor of revisiting *Biggers*' witness-certainty factor. When the "necessity and propriety" of overruling a prior decision has been established, the Court has not hesitated to act. *Ring v. Arizona*, 536 U.S. 584, 608 (2002) (internal quotation omitted). Indeed, "[w]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne*, 501 U.S. at 828 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). All four of the factors this Court weighs when reexamining a prior precedent—workability, reliance, subsequent development of the law, and whether changed facts have "robbed the old rule of significant application or justification," *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992)—suggest that this Court should reconsider and reject the witness-certainty prong of *Neil v. Biggers*.

A. Scientific Research And Subsequent Developments In the Law Have Robbed The Witness-Confidence Factor Of "Significant Application Or Justification."

The touchtone of *Biggers* is reliability. The problem with the witness-certainty prong of *Biggers*, however, is the ensuing scientific consensus that witness certainty has nothing to do with reliability. Empirical evidence has established beyond reasonable dispute that the extent to which a witness is certain of an identification has, at best, a weak correlation to the accuracy of that identification

and, at worst, no correlation at all, or even a negative correlation. *See* Pet. 4-12. A number of factors other than accuracy often more powerfully influence the certainty of a witness's memory including: the violence of the event, the presence of a weapon, and expectations based on cultural biases and past experiences. *See* Elizabeth Loftus, *Eyewitness Testimony* 31-51 (1979). Studies also show that witness-certainty is easily manipulated and often affected by post-identification events that have nothing to do with a witness's memory. *See, e.g.*, Amy L. Bradfield, et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002). At the same time, research shows that fact-finders place a disproportionate weight on the confidence of the witness in their reliability analysis. As one study explained: "Jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses—because they rely so heavily on witness confidence, which is relatively nondiagnostic—and are generally insensitive to other factors that influence identification accuracy." Wells, *Recommendations for Lineups and Photo Spreads*, *supra*, at 624; *see also Ramirez*, 817 P.2d at 780 (noting the "common knowledge that people do possess [regarding eyewitness accuracy] often runs contrary to documented research findings").

In short, the empirical foundation upon which the witness-confidence prong of the *Biggers* decision was built is no longer grounded in science (if, indeed, it ever was). When the underlying empirical basis for a decision is so clearly called into question, *stare decisis* does not bar its reconsideration. Indeed, "the notion that an important constitutional decision with *plainly inadequate rational support* must be left in place for the sole reason that it once attracted five votes" is unacceptable. *Payne*, 501 U.S. at 834 (Scalia, J., concurring) (emphasis modified).

This is not the first case where the Court has been asked to update legal principles in accordance with empirical understanding. In *Payne*, for example, this Court granted *certiorari* specifically "to reconsider [its] holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence." 501 U.S. at 817. In overruling those prior decisions, the Court reasoned that "*Booth* and *Gathers* were based on two premises" that had subsequently proven faulty. *Id.* at 819. Likewise, in this Court's landmark decision in *Brown v. Board of Education*, the Court found that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," it had been supplanted by "modern authority." 347 U.S. at 494. Accordingly, the Court rejected *Plessy* and its faulty premise. *Id.* Where a previous holding is "wrong" as an empirical matter, that decision should be reconsidered and corrected. *See Payne*, 501 U.S. at 825; *Brown*, 347 U.S. at 494-95. So too here.

B. Revisiting The Witness-Confidence Factor Would Not Impose Any Special Hardship Because Reliance Interests Are Not At Stake.

Revisiting any of the *Biggers* factors will not impose any "special hardship" based on reliance. *Casey*, 505 U.S. at 854. Although "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828. So too here. As this Court noted in *Payne*, reconsideration and reexamination of old precedent is of particular importance where that precedent may incorrectly exclude evidence thus "prevent[ing] the jury from having before it all the information necessary to determine the proper punishment." *Id.* at 825. Obviously the government has no reliance interest in seeing

defendants convicted on the basis of unreliable eyewitness evidence.

C. The Witness-Confidence Prong Is Not Workable In Any Meaningful Sense.

Although it is true that witness "certainty" can be ascertained fairly easily—by simply asking a witness—this factor is only superficially workable. Workability requires more than mere ease of application; it requires that a factor actually "work" by serving as an accurate proxy. But witness confidence is no predictor of accuracy.

Decisions that cannot be squared with modern scientific knowledge and unquestioned empirical evidence diminish public confidence in our legal system. Indeed, a "decision contrary to the public sense of justice ... operates, so far as it is known, to diminish respect for the courts and for law itself." *Payne*, 501 U.S. at 834 (Scalia, J., concurring) (internal quotation omitted). Here, continued application of *Biggers*' witness-certainty factor—supported by nothing more than judicial fiat—would amount to "stunning *ipse dixit*" that certainty is relevant to accuracy when, in fact, it is not. *Id.* Little could "conflict[]" more "with a public sense of justice." *Id.*

III. THE PERVASIVE APPLICATION OF *BIGGERS*' WITNESS-CERTAINTY FACTOR DEMANDS REVIEW.

The role of the *Biggers* factors in admitting otherwise inadmissible eyewitness testimony is not a matter of minor academic interest. Trial courts in the state and federal systems rely on *Biggers* almost daily to admit or exclude evidence. Suffice it to say that even a cursory review of a legal database such as Westlaw or Lexis-Nexis reveals *thousands* of citations of *Biggers*.

No issue in criminal law today is of more pressing importance in terms of preventing wrongful convictions. Eyewitness misidentification is now the single greatest source of wrongful convictions in the United States and

responsible for more wrongful convictions than *all* other causes combined. *See* Wells, *Recommendations for Lineups and Photospreads*, *supra*, at 6. Indeed, a Justice Department survey revealed that 85% of erroneous convictions occurred primarily because the defendant had been misidentified by a witness. National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, DOJ Pub. No. NCJ 161258, 16-17 ex.3 (1996). In that study, the authors identified and reviewed twenty-eight cases where convicted defendants were exonerated by DNA evidence and concluded that "[i]n the majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence." *Id.* at 24.

That trial courts are called upon to apply the witness certainty factor on an almost daily basis is especially troubling for three reasons. *First*, a *Biggers* analysis only occurs *after* the trial court has determined that a witness identification would otherwise be constitutionally inadmissible. Only where an identification is tainted—because of an improper line-up, show-up, photo array, or other impermissibly suggestive procedure—does a trial court conduct a second-tier reliability analysis. To satisfy the second inquiry, the court determines whether the identification is reliable *independent* of the unduly suggestive identification procedure. The use of the certainty factor in this second-tier analysis is troubling because that factor has been shown—beyond reasonable dispute—to be uncorrelated to accuracy. *Second*, as noted above, the use of the witness certainty factor in this second-tier analysis is even more disturbing because a suggestive identification technique may itself increase witness certainty. *See supra* at 11. *Third*, even though research has shown that witness certainty bears little, if any, relation to the accuracy of an identification, courts often refuse to look behind the words of a witness who says that he or she is "certain." Many courts require

nothing more than superficial certainty. *See, e.g.*, *Napoli*, 814 F.2d at 1160.

A few real-world examples highlight the perniciousness of the certainty factor. Take, for example, *United States v. Smith*, 156 F.3d 1046. In that case, the pre-trial identification procedures were unquestionably suggestive. The photo array was too limited because it contained only four or five photos (six is considered small enough to weigh heavily against admissibility) and the manner of presentation was rife with errors: names were on the photographs; the agent in charge told witnesses that they had picked the correct photo; each photo was signed and dated by each witness—so that each subsequent witness saw the signatures of his or her co-employees on the defendant's photo; and one witness was shown a mug shot of the defendant and told "off the record" that the defendant was the suspect. *Id.* at 1050-51. One witness was at first unable to identify the suspect. It was only after the agent left the witness alone with the loose photos, one of which had been signed and dated by his co-workers, that the witness identified the defendant. *Id.* At trial, however, that witness testified that he "was real, real sure" of his identification. *Id.* at 1052. Yet, even in these circumstances, the trial court found this self-professed "certainty" sufficient and the Tenth Circuit affirmed; the certainty factor of *Neil v. Biggers* thus supported the admissibility of an unquestionably unreliable pre-trial identification. *Id.*

In *Grayer v. McKee*, only one witness was able to link the defendant to a carjacking. *See* 149 Fed. Appx. at 438-39. After an indisputably suggestive identification, the court reviewed the *Biggers* factors and found the identification admissible. The Sixth Circuit affirmed. It found that the witness "did not have a good opportunity to view the carjacker" because the witness had an impeded view and only a "short period" to observe the defendant. *See id.* at 445-46. Moreover, according to the court, the

witness has been somewhat "distracted," *id.* at 446; her description was "implausible," *id.* at 445, and at "least partially inaccurate," *id* at 447. Nonetheless, the Sixth Circuit concluded that the witness's identification "exhibited a high level of certainty, which *under established precedent*, supports the reliability of her identifications." *Id.* at 448 (emphasis added).

In this case, after the eyewitness—himself a defendant cooperating with the government—indicated that a person with "dark skin" had paid for a murder-for-hire, the witness was shown a photo array of eight individuals. Pet. 2. Only one of the subjects—Petitioner Jose Perez—had dark skin. *Id.* The district court relied on the eyewitness's certainty of his out-of-court identification and the Second Circuit affirmed. As courts are called on to apply *Biggers* every day, such stories are legion. *See Napoli*, 814 F.2d at 1160 (holding that the failure of witnesses to pick the defendant out of a line-up and photoarray did not necessarily "or even normally, make the later identification less certain"); *cf. Brodes*, 614 S.E.2d at 768 (rejecting application of *Biggers* while noting that a witness who was unable to give the police *any* physical characteristics of the perpetrator later testified that he was "absolutely certain" and "dead certain" of his identification).

* * *

When a constitutional decision leaves our courts in a position of willful blindness to evolving knowledge it should be corrected. Here, the Court confronts "a wrongly decided, unworkable precedent calling for some further action" and should not "compound the original error" by ignoring it, but should directly confront it. *Payne*, 501 U.S. at 842-43 (Kennedy, J., concurring). Following this course here "has itself the support not only of precedent but of practical sense as well." *Id.* at 844. *Amicus curiae* NACDL therefore respectfully requests that the Court

grant *certiorari* to reconsider and overrule *Neil v. Biggers* to the extent that it is inconsistent with the core principles of this Court's identification jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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No. 05-596

In the Supreme Court of the United States

JOSE ANTONIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Reasonable people might disagree about whether or under what circumstances this Court should promulgate binding, multi-factor tests, such as the one at issue here. But it ought to be beyond dispute that if and when this Court does so, the test should clearly accomplish its intended purpose. Concomitantly, lower courts should not be required to persist in employing a test whose empirical basis has, with the passage of time, been shown to be of dubious validity.

The government's main argument for retaining the witness-certainty test from *Neil* v. *Biggers*, 409 U.S. 188 (1972)—beyond a few "vehicle" contentions which, as we show below, are entirely without merit—is that a handful of studies exist that run counter to the prevailing view that the certainty factor is not an appropriate measure of an identification's reliability. The government's approach in essence establishes a presumption that would keep in place virtually indefinitely a standard that has long since been discredited by the great weight of authority.

The government's suggestion that the existence of a few outlying studies warrants retention of the witness-certainty factor should be rejected. Instead, the witness-certainty factor should be removed from the list of mandatory criteria that lower courts must consider when assessing the reliability of suggestive identifications.

The importance of the issue could not be greater. As the Innocence Network notes in its amicus brief in support of certiorari (at 16), mistaken identifications played a part in *over 75%* of known convictions for which the individual was later exonerated by DNA evidence. The *Biggers* witness-certainty factor is scientifically unsound, has been widely rejected, and leads to the conviction of innocent defendants. The continued admissibility of unreliable eyewitness evi-

dence undermines the integrity of the criminal justice system and subverts the twin goals of law enforcement: convicting the guilty and protecting the innocent. The petition should be granted.

I. *Biggers*'s Witness-Certainty Test Is Unsound.

The intuitive notion that courts should be more willing to allow into evidence an eyewitness identification when the witness is confident as to that identification is unsound. The government's counterarguments (Br. in Opp. 8–12) are largely based on a misinterpretation of our argument.

We do not argue that there is "'*no*' relationship" between witness certainty and accuracy of identification (Br. in Opp. 9 (quoting *Commonwealth* v. *Cruz*, 839 N.E.2d 324, 331 (Mass. 2005) (emphasis added)). As we acknowledge in the petition (at 6–7), some research shows that there may be a slight relationship between the two, such that a witness who is more certain as to an identification is somewhat more likely to be accurate in that identification. Other research has found there to be no correlation or has even found there to be a *negative* correlation. See Pet. 6. This variation alone is a sufficient basis for granting the Petition and removing the witness-certainty factor from *Biggers*. Lower courts should not be *required* to apply a standard that even the government would have to concede is not broadly and consistently viewed by the experts as reliable.

This is quite unlike a situation in which a *legal* question is subject to differing answers and thus amenable to further "percolation" in the lower courts. Here it is plain that, at a minimum, the witness-certainty factor is of dubious scientific validity. In these circumstances there is no justification for continuing to require lower courts to apply it.

Moreover, although it would be impractical (and probably unwise, from the standpoint of institutional competence) for petitioner or the government to ask this Court to undertake an independent assessment of the underlying science,

the evidence to which the government points is weak. For example, while the Wells and Olson article on which the government heavily relies notes that a meta-analysis by Sporer found a correlation between certainty and accuracy, it comments that it is "unclear" whether the result of this "meta-analysis of experiments can be directly applied to actual cases in which there are other influences that inflate the certainty of eyewitnesses." See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277, 284 (2003), *available at* http://www.psychology.iastate.edu/-faculty/gwells/annual_review_2003.pdf. And the sentence from the Mayer article quoted in part by the government (at 9–10 n.*) actually states in full that "[a] *few* studies show that confidence level is a valid predictor of identification accuracy, while *many* others demonstrate that there is no correlation between certainty and reliability of the identification." Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 852–53 (1994) (emphasis added).

The simple fact is that, even if there did turn out to be some small correlation between certainty and accuracy, it is—on the government's own studies—sufficiently weak that it is likely to be misleading in a wide range of cases. Where else do we systematically draw judges' and jurors' attention to indicia that *even at best* have error rates of 30%? And where else do we draw attention to such a problematic indicator without providing the jury information about just how problematic an indicator it is?

Requiring the certainty factor to be considered leads to far too many "false positive" results, in which juries give excessive credence to a confident but inaccurate identification. It makes no sense to continue dong so. This Court should revisit *Biggers* and excise this scientifically and constitutionally problematic factor from the admissibility analysis.

II. The Fact That No Court Has Expressly Refused To Follow *Biggers* In No Way Undermines The Case For Certiorari.

The government argues (Br. in Opp. 12–13) that certiorari is unwarranted because there is no division of authority in the lower courts. That is a red herring. As we explained in our petition, there can be no circuit split or other express division among the lower courts in this situation. As the government recognizes (*id.* at 12), the lower courts cannot overturn *Biggers*, and cannot ignore this Court's holding in that case that witness certainty must be considered in deciding whether the admission of evidence violates the federal Due Process Clause.

It would make no sense for this Court to wait in vain for the lower courts to engage in lawless insurrection before granting review. And in fact state courts and lower federal courts have held that the empirical premise on which *Biggers* rested—the notion that witness certainty is substantially correlated with accuracy—has no basis. See Pet. 12–16.

While avoiding direct conflict with *Biggers*, as they must, state and federal courts alike have made plain their lack of confidence in the decision. Many of the state courts that have rejected the *Biggers* rule as a matter of state constitutional law have done so under general principles of due process contained in state constitutions. See Pet. 13–15 (discussing the holdings of *State* v. *Ramirez*, 817 P.2d 774, 780–781 (Utah 1991) (holding *Biggers* test is insufficient guarantee of due process under the Utah Constitution and adopting a "more empirically based" test); *Commonwealth* v. *Johnson*, 650 N.E.2d 1257, 1260–1261 (Mass. 1995) (state constitution requires *per se* exclusion of unnecessarily suggestive identifications); *State* v. *Dubose*, 699 N.W.2d 582, 593–596 (Wis. 2005) (adopting a *per se* exclusion of unnecessarily suggestive line-ups unless the procedure was necessary under the totality of the circumstances)). Other state and federal

courts that have addressed the witness-certainty factor in contexts other than pre-trial admissibility hearings—and thus in instances in which *Biggers* is not controlling—have also been extremely critical of the witness-certainty factor.[1]

These courts have all recognized *Biggers*' shortcomings. But only this Court can reconsider *Biggers* as a matter of federal constitutional law. There is no reason to wait any longer to do so.

III. Petitioner's Claim Was Adequately Presented Below.

The government argues (Br. in Opp. 13–15) that certiorari should be denied because petitioner's challenge to *Biggers* was not adequately presented to or preserved in the court of appeals. That assertion is flatly incorrect. Petitioner's opening brief in that court explicitly raised the issue, arguing that

> the continuing viability of [the witness-identification] factor has been called into serious question by the numerous reported DNA exonerations of people who had been convicted, many of capital felonies, based on eyewitness identifications by people who were quite certain, but were nonetheless wrong.

2d Cir. Br. 47. The argument was reiterated in petitioner's reply brief in that court, which explained that the government

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[1] See, *e.g.*, *Brodes* v. *States*, 614 S.E.2d 766, 771 (Ga. 2005) (holding that trial courts should not instruct juries to consider the witness's level of certainty "when instructing them on the factors that may be considered in deciding the reliability of [an] identification"); *State* v. *Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) (criticizing the witness certainty factor as "particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness * * * and the accuracy of that identification). See also Pet. 14–16.

had failed to respond to the claim that the certainty factor was no longer viable and should be rejected "in light of currently-available scientific research demonstrating that there is virtually no correlation between the *certainty* expressed by a witness and the accuracy of the [sic] his/her identification." 2d Cir. Reply Br. 12.

In fact, at oral argument in the Second Circuit, both parties argued about the viability of the certainty factor. The government did not claim that petitioner had waived the issue. Instead, it asserted that petitioner had raised "an interesting argument, [but] really not an argument that can be made here. * * * Ultimately what defense counsel is asking [the Second Circuit] to do is to overrule *Neil* v. *Biggers*, which, obviously, is something that would put [that] court in difficult straits."[2]

Judge Calabresi, too, specifically noted that this issue was presented by petitioner's appeal but was not one on which the Second Circuit could grant relief. Defense counsel argued that "certainty has no relation to accuracy and I don't think the Court can ignore the scientific evidence that's now available." In response, Judge Calabresi asked, "But can we bring *Biggers* into question, or is that something that only the Supreme Court can do?" A member of the panel appeared to agree that the certainty factor is problematic, noting that it is "interesting that it isn't generally allowed to let a jury know just how frequently firm identifications turn out to be false." And Judge Calabresi went on to note that, while trial courts might be able to scrutinize *Biggers* presentations with care,

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[2] The Second Circuit does not transcribe oral arguments, but audiotapes are available from that court. After consulting with the Supreme Court clerk's office, in this brief we quote from our informal transcript of relevant portions of the oral argument. However, we would be glad to have the oral argument formally transcribed in its entirety were the Court to request it.

and "the Supreme Court could change the rule * * * arguably the one court that can do very little about that is the court that's in the middle"—the court of appeals.

Thus, the briefs and argument below clearly addressed the claim presented in the petition, and in any event the government has waived any objection by arguing the issue below without suggesting that it was not properly raised. The Second Circuit's opinion is merely a straightforward application of *Biggers*, which—as the Second Circuit itself noted at oral argument—can be corrected only by this Court.[3]

IV. The Government's Speculation That The District Court Might Have Admitted The Eyewitness Identification Evidence Even Without Relying On The Witness Certainty Factor Is Unsupported And No Cause To Deny Review.

The government also contends that this case is an improper vehicle for considering the question presented because, it asserts, there is "little doubt" that the district court would have admitted the identification evidence even if that court had not considered the witness's certainty in his identification. See Br. in Opp. 15. That claim should be rejected, for two reasons.

First, this is sheer speculation on the part of the government. Neither the government nor this Court can know how

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[3] It is unsurprising that the Second Circuit did not specifically discuss the viability of the certainty factor in its summary order, because that court is, of course, "well aware of the Supreme Court's admonition that if a Supreme Court precedent has direct application in a case before us, but rests on reasons [subsequently eroded], [the lower court] should follow the directly controlling case and leave to the Supreme Court the prerogative of overruling its own decisions." *United States* v. *Logan*, 419 F.3d 172, 180–181 (2d Cir. 2005) (quoting *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted)).

the district court would have weighed the remaining factors in assessing this concededly suggestive identification had it not been able to consider the witness's certainty in deciding whether to admit his testimony.[4] Thus, the appropriate course of action is for this Court to grant review to determine whether that factor should be considered *at all*, leaving it to the lower court, if necessary, to reweigh the various factors relevant to admissibility *after* this Court's review.

Second, the government's speculation that the witness-certainty factor might not have affected the admissibility of the eyewitness testimony in this case could be made in *every* case in which witness certainty is at issue. Thus, given the frequency with which eyewitness testimony is critical in criminal cases (see NACDL Amicus Br. 15–19; Innocence

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[4] The district court found that the huge, five-year lapse between the crime and the unconstitutionally suggestive identification procedure was "counterbalance[d]" by the other four *Biggers* factors, including the witness certainty factor. Pet. App. 19a. In particular, the court found that Lopez had a "significant opportunity" to view petitioner (*id.* at 16a), that his degree of attention added "somewhat to the reliability of his identification" (*id.* at 17a), that the accuracy of his description weighed "slightly in favor" of reliability (*id.* at 18a), and that he had a "significant level of certainty" in his identification (*id.* at 19a).

The government asserts that the district court "appears to have placed the greatest weight" on the opportunity Lopez had to view the owner of the auto shop (Br. in Opp. 16), but that is pure speculation. What we do know from the district court's opinion is that it weighed the positive factors *together*. Pet. App. 19a. More importantly, that court found that both the witness's opportunity to view the owner of the auto shop and his level of certainty were "significant" factors in favor of finding reliability. *Ibid.* Because the court found that Lopez's level of certainty was a "significant" factor in favor of finding the identification reliable, the government cannot reasonably argue that it knows whether the lower court would have admitted the identification absent that factor.

Network Amicus Br. 16–19), and the evidence suggesting that eyewitness certainty is a highly problematic factor, the government's speculation provides no reason not to grant review and revisit *Biggers* now, before more innocent defendants are convicted based on evidence that should have been excluded.

V. The Admission Of The Eyewitness Identification Evidence In This Case Was Not Harmless Error.

The government's final argument is that the Court should not grant certiorari to consider the validity of the witness-certainty factor because, even if the identification evidence had been excluded, "there is little doubt" that petitioner would nonetheless have been found guilty based on other evidence. See Br. in Opp. 16. This argument is baseless.

In order for the government to prevail on its harmless error argument, it must demonstrate that the admission of the identification evidence was "harmless *beyond a reasonable doubt*." *Chapman* v. *California*, 386 U.S. 18, 24 (1967) (emphasis added); see also *Neder* v. *United States*, 527 U.S. 1, 15 (1999); *United States* v. *Wade*, 388 U.S. 218, 242 (1967). Particularly given the weight jurors place on eyewitness testimony (see, *e.g.*, ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 9–11 (1996) (finding that in a study of 150 mock jurors, 68% who heard eyewitness testimony with cross-examination voted guilty compared with 18% who did not hear such testimony)), the government cannot conceivably meet that burden based on the evidence in this record.

In this case, the eyewitness identification was persuasive evidence linking petitioner to the crime because the witness, Mario Lopez, identified petitioner as the "owner" of the auto shop who, he said, repeatedly attempted to call the victim to lure him to the shop. Gov't 2d Cir. Br. 15, Tr. 1289–1290. Of course, the government acknowledges that petitioner was *not* the "owner" of the auto shop. See Br. in Opp. 3 (Perez Auto owned by Wilfredo Perez, not petitioner).

The other evidence used to link petitioner to the crime was highly problematic. In particular, the credibility of the other individuals who linked petitioner to the murder was low. Ollie Berrios, who implicated petitioner, received total immunity for his involvement in the crime in exchange for his testimony. Pet. 2d Cir. Br. 4 & n.5; Tr. 1635–1636. And Santiago Feliciano, the government's other main witness, pleaded guilty immediately after he was indicted and cooperated with the government in exchange for favorable treatment. Pet. C.A. Br. 5 n.7. Any defense lawyer worth his or her salt would be more than happy to try a case in which the primary evidence against the defendant was the testimony of such dubious cooperating witnesses.

Thus, given (1) the questionable nature of the evidence against petitioner other than Lopez's eyewitness testimony, (2) the importance jurors place on eyewitness testimony, and (3) the high burden the government would have to meet to demonstrate harmless error, the government's harmless-error argument provides no basis to deny the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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